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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 200

TRAYTON L. LATHROP, APPELLANT,

vs.

JOSEPH D. DONOHUE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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IN THE CIRCUIT COURT OF DANE COUNTY, STATE OF WISCONSIN

TRAYTON L. LATHROP, Plaintiff,

vs.

JOSEPH D. DONOHUE, Defendant.

COMPLAINT—Filed June 9, 1959

The above named plaintiff, for and as his complaint against the above named defendant, alleges as follows:

1. That the plaintiff is a resident of the City of Madison, Dane County, Wisconsin, and is engaged in the practice of law in said city, as member of the law firm of Thomas, Orr, Isaksen, Werner & Lathrop.

2. That the defendant is a resident of the City of Fond du Lac, Fond du Lac County, Wisconsin, and is engaged in the practice of law in said city.

3. That the defendant is and has been since June 1958 the treasurer of an organization known as the "State Bar of Wisconsin", which is more particularly described and referred to hereinafter.

4. That the plaintiff is a native of the State of Wisconsin, entered the University of Wisconsin in September 1940, attended the School of Letters and Science and the Law School, received a Bachelor of Arts degree with a major in political science in September 1943, was in military service [fol. 10] from September 1943 until June 1946, and attended the Law School of the University of Wisconsin, from June 1946 until February 1948, whereupon he received a degree of Bachelor of Laws from the University of Wisconsin. That in February of 1948, the plaintiff, after having complied with all of the requirements therefore, was licensed to practice law in the State of Wisconsin

and has been so licensed and has practiced law in the City of Madison, Wisconsin, ever since. That the plaintiff's only training and only means of livelihood is as a lawyer and that the plaintiff has no income outside of his income derived from the practice of law.

5. That the plaintiff was a member of an organization of lawyers in the State of Wisconsin known as the Wisconsin Bar Association for the years 1948 through 1956, both inclusive, and has been a member of an organization of lawyers known as the Dane County Bar Association during all of the time that he has been practicing law.

6. That prior to January 1, 1957, there was no coercion on the part of the State of Wisconsin or any of its agencies upon any attorney to support any organization of attorneys or any other organization.

7. That pursuant to a petition purportedly authorized by a majority of the members of the Board of Governors of the Wisconsin Bar Association, (the governing body of the Wisconsin Bar Association) which was signed by the president, president-elect, immediate past president, and treasurer of the Wisconsin Bar Association, and 28 other members of the Wisconsin Bar Association, and which recited that the Wisconsin Bar Association had only 3,206 [fol. 11] members, constituting approximately 68% of the total number of lawyers practicing in the State of Wisconsin, the Supreme Court of the State of Wisconsin, on June 22, 1956 directed the aforesaid petitioners to draft proposed rules "... for integration of the State Bar ..." and to submit them to the Supreme Court. That said direction appears in Vol. 273 of the Wisconsin Reports published by Callaghan & Company (1957) on pages 281-285, and is incorporated herein and made a part hereof by reference. That a proposed set of rules and by-laws creating an organization to be known as the State Bar of Wisconsin was filed by said petitioners with the Supreme Court on or about September 10, 1956.

8. That on December 7, 1956, the Supreme Court of the State of Wisconsin entered an order adopting, with

some modifications, the aforesaid proposed set of rules and by-laws, creating an organization to be known as the "State Bar of Wisconsin." Said order further appointed the existing officers of the Wisconsin Bar Association as officers of the State Bar of Wisconsin, and appointed a Board of Governors for the new organization, the Board of Governors being substantially different in organization and membership from the Board of Governors in the Wisconsin Bar Association. Said order provided that it was to be effective for a period of two years beginning on January 1, 1957. Said order and said rules and by-laws and the opinion of the court accompanying the same are set forth in Vol. 273 of the aforesaid Wisconsin Reports on pages vii to xxxvii, both inclusive, and are incorporated herein and made a part hereof by reference.

[fol. 12] 9. That said rules and by-laws required the plaintiff to enroll in the State Bar of Wisconsin and to pay dues to the treasurer of the State Bar of Wisconsin on the penalty of being deprived of his livelihood as a practicing lawyer, if he should fail to do so.

10. That in order to be able to continue to practice law, the plaintiff enrolled in said organization and paid the dues required thereby for the years 1957 and 1958.

11. That the State Bar of Wisconsin and its officers and committees began to function as an organization pursuant to said rules and by-laws on January 1, 1957 and have done so ever since. That the officers, governing body and committees of the Wisconsin Bar Association ceased to function after December 31, 1956. All files and property of the Wisconsin Bar Association were taken into possession of the State Bar of Wisconsin as of January 1, 1957, as plaintiff is informed and believes.

12. That on December 22, 1958, the Supreme Court of Wisconsin entered an order continuing in effect after December 31, 1958 for an indefinite period of time, the rules and by-laws above referred to. Said order and the opinion on which it is based is reported in Vol. 5 of the Wisconsin Reports, Second Series, (Advance Sheets) on pages 619 to 627, and is incorporated herein by reference. A copy

of the rules and the by-laws of the State Bar of Wisconsin as continued in effect by said order of December 22, 1958, and a copy of said opinion and order of December 22, 1958 are attached hereto as Exhibit A and made a part hereof.

[fol. 13] 13. That since January 1, 1957, the State Bar of Wisconsin has employed a lawyer, as full time executive director, as provided for in Article VI of the by-laws of the State Bar of Wisconsin above referred to, said director being the same director who was employed full time by the Wisconsin Bar Association prior to January 1, 1957. That a staff consisting of another lawyer and several stenographers are now employed by said State Bar of Wisconsin under the direction of said executive director. Said director and said staff are paid out of funds of the State Bar of Wisconsin which funds are made up of moneys received as dues obtained from attorneys pursuant to sections 2 and 3 of Article I of said by-laws and of moneys received from advertising in the State Bar Bulletin which is hereinafter referred to.

14. That as plaintiff is informed and believes, the income of the State Bar of Wisconsin from dues as aforesaid and from advertising as aforesaid is approximately $90,000 per year, of which approximately $10,000 is received from advertising and the balance is received from dues, as compared with the income of $45,000 received by the Wisconsin Bar Association in the year 1956, of which the income from advertising was approximately $5,000 and the balance was received from dues.

15. That the executive director and his staff, as a part of their employment by the State Bar of Wisconsin devote a substantial part of their time in assisting all of the chairmen of the standing committees provided for in said by-laws, as well as the Board of Governors and officers provided in said rules and by-laws.

[fol. 14] 16. That said executive director and his clerical staff as a part of their employment by the State Bar of Wisconsin publish bi-monthly, with the funds of the State

Bar of Wisconsin, a publication entitled "The Wisconsin Bar Bulletin" at 402 West Wilson Street, Madison, Wisconsin. That a publication of the same name and style was published by the Wisconsin Bar Association prior to January 1, 1957. That said publication is devoted to publishing papers and articles suggesting changes in the laws of the State of Wisconsin and of the United States as well as biographical articles, articles discussing the present status of the laws of the State of Wisconsin, and of the United States and to the advertising of books, publications, trust services, life and health insurance, and a variety of other matters.

17. That except for the coercion upon attorneys to become members thereof and to financially support it, the State Bar of Wisconsin functions substantially in the same manner and carries on substantially the same work as did the Wisconsin Bar Association, and as does the American Bar Association, although on a smaller scale than in the case of the latter association.

18. That one of the main objects and purposes of the State Bar of Wisconsin has been at all times since its organization to promote law reform, to make studies of an unlimited variety of the laws of the State of Wisconsin [fol. 15] and of the United States relating to the practice of law, and to the courts, such as the laws and constitutional provisions relating to court systems and the systems of selecting judges, tax codes, corporate codes, property laws, criminal codes, law among nations, laws and rules affecting compulsory membership in organizations of lawyers and, in furthering its objects and purposes, it makes and opposes proposals for changes in such laws and constitutional provisions and argues to legislative bodies and their committees and to the lawyers and to the people with respect to the adoption of changes in such codes, laws and constitutional provisions. That the State Bar of Wisconsin, its officers, governing body and committees have since January 1, 1957 been actively engaged in promoting law reform and making such studies, proposals and arguments. That the State Bar of Wisconsin

has used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to plaintiff's convictions and beliefs.

19. That the State Bar of Wisconsin, since January 1, 1957 has been engaged in a program for advancing public acceptance of the object and purposes of the organization through the press and other means. In this connection the State Bar of Wisconsin has been promoting a ladies auxiliary, by the use of its employees, property and funds.

20. That after a second request therefor had been made upon the plaintiff, and in order to be able to continue to engage in the profession for which he had been trained, the plaintiff unwillingly and under protest on or about March 6, 1959 paid to the defendant the sum of $15, by a certified check payable to the order of the defendant for that amount. That the plaintiff informed the defendant in a letter which accompanied said check that said check was sent under compulsion of sections 2 and 3 of Article I of the by-laws of the State Bar of Wisconsin and under [fol. 16] protest, and that he would hold the defendant personally liable for the amount thereof. That a copy of the plaintiff's aforesaid letter is attached hereto and made a part hereof, by reference, as Exhibit B. That the letter and said check were received by the defendant in the month of March, 1959, and said defendant cashed said check and received therefor the sum of $15.00 and commingled said $15.00 with the funds of the State Bar of Wisconsin, and that said $15.00 has not been repaid to the plaintiff in whole or in part.

The plaintiff bases this action on his claim that the defendant has unjustly received, held, and disposed of funds of the plaintiff in the amount of $15.00, which to the knowledge of the defendant were paid to the defendant by the plaintiff unwillingly and under coercion, and that such coercion was and is entailed in the rules and by-laws of the State Bar of Wisconsin continued in effect by the aforesaid order of the Supreme Court of the State of Wisconsin

dated December 22, 1958; and the said order insofar as it coerces the plaintiff to support the State Bar of Wisconsin, is unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States and sections 1, 3, 4, 18 and 22 of Article I of the Constitution of the State of Wisconsin.

Wherefore, the plaintiff prays that the court enter judgment against the defendant Joseph D. Donohue, in favor of the plaintiff, in the amount of $15.00, plus interest thereon from March 31, 1959, that the plaintiff recover his [fol. 17] costs and disbursements made in this action, and that the plaintiff have such other relief as may be just.

Trayton L. Lathrop, Room 305, 122 West Washington Avenue, Madison 3, Wisconsin.

Of Counsel: Leon E. Isaksen, 122 West Washington Avenue, Madison 3, Wisconsin.

Duly sworn to by Trayton L. Lathrop, jurat omitted in printing.

[fol. 17a]

EXHIBIT "A" TO COMPLAINT

STATE BAR RULES

Rule 1

ORGANIZATION OF STATE BAR OF WISCONSIN

Section 1. Creation of association. All persons licensed to practice law in this state are hereby organized as an association to be known as the "State Bar of Wisconsin", subject to the provisions of the rules hereinafter set forth. These rules, which are adopted in exercise of the court's inherent authority over members of the legal profession as officers of the court, may be called "State Bar Rules". The words "State Bar" wherever used in these rules mean the State Bar of Wisconsin. The words "the Court" and "Court" wherever used in these Rules mean the Supreme Court of Wisconsin unless the context requires otherwise. The State Bar may, for the purpose of carrying out the

purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and dispose of real and personal property.

Section 2. Purposes. The purposes of the association shall be to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged.

Rule 2

MEMBERSHIP

Section 1. Persons included in membership. The membership of the State Bar initially shall consist of all those persons who on the date when these rules take effect are licensed to practice law in this state, and after these rules take effect shall include also all those persons who become licensed from time to time to practice law in this state; subject in each case to due compliance with the conditions and requirements of membership. Residence in the state of Wisconsin shall not be a condition of eligibility to membership in the State Bar.

Section 2. Enrollment. Each person licensed to practice law in this state shall enroll in the State Bar by registering his name with the secretary of the association within sixty days after the effective date of these rules, in accordance with the requirements of the By-laws. Every person who becomes licensed, after these rules becomes effective, to practice law in this state shall enroll in the State Bar in like manner by registering his name with the secretary of the association within ten days after admission to practice.

Every change after such enrollment in any member's office address or residence address or principal office location shall be reported promptly to the secretary.

Section 3. Classes of membership. The members of the State Bar shall be divided into two classes known respectively as "active" members and "inactive" members. The class of active members shall include all members of the State Bar except the "inactive" members. The class of inactive members shall be limited to those persons who are eligible for active membership but are not engaged in the practice of law in this state and have filed with the secretary of the association written notice requesting enrollment in the class of inactive members. Judges of courts of record not engaged in the practice of law shall be inactive members. Any inactive member in good standing, except a judge of a court of record, may become an active member by filing with the secretary a written request for transfer to the class of active members and by paying the dues required of active members. No inactive members shall be entitled to practice law in this state or to hold office or vote in any election conducted by the State Bar. No person engaged in the practice of law in this state in his own behalf or as an assistant or employee of an active member of the State Bar, or occupying a position the duties of which require the giving of legal advice or service in this state shall be eligible for enrollment as an inactive member.

Section 4. Only active members may practice law. No individual other than an enrolled active member of the State Bar shall practice law in this state or in any manner hold himself out as authorized or qualified to practice law. Any court in this state may by special permission granted by it allow non-resident counsel to appear and participate in a particular action or proceeding in association with an active member of the State Bar of Wisconsin who appears and participates in such action or proceeding.

Section 5. Membership dues. Every active member shall pay membership dues in such amount not exceeding twenty dollars per year, as may be fixed in the By-laws; and

every inactive member shall pay membership dues in such amount, not exceeding ten dollars per year, as may be fixed in the By-laws. All dues shall be paid to the treasurer of the association and shall constitute a fund for the payment of the expenses of the association.

Section 6. Penalty for non-payment of dues. If the annual dues of any member remain unpaid at the expiration of ninety days from the time when such dues are due and payable, the membership of such member may be suspended by the board of governors in the manner provided in the By-laws; and no person whose membership is so suspended for non-payment of dues shall be entitled to practice law during the period of such suspension.

Section 7. Voluntary resignation of membership. Whenever a member of the State Bar in good standing files with the secretary written notice of such member's election to surrender his license to practice law and to terminate his membership in the association, such person shall thereupon cease to be a member of the State Bar, and his name shall be removed from the membership register.

Section 8. Avoidance of hardship. The board of governors may in any case in which to do otherwise would result in hardship or injustice, permit the retroactive enrollment of members and waive penalties prescribed for delinquency in the payment of membership dues.

Rule 3

OFFICERS

Section 1. Titles. Nomination and election. The officers of the association shall be a president, a president-elect, a secretary and a treasurer, who shall be nominated and elected respectively in the manner provided in the By-laws. Only active members of the State Bar residing in Wisconsin shall be eligible to serve as officers of the association. The term of office of each officer shall be one year and until the election and qualification of his successor; except in the case of interim officers appointed by the court to hold office until the annual meeting of the association next

following the effective date of these rules. The officers shall receive no compensation for their services.

Section 2. Duties of officers.

President: The president shall be the chief executive officer of the association, and shall preside at all meetings of the association and at all meetings of the board of governors. He shall appoint and announce as soon as possible after the annual meeting of the association in each year the membership of all committees for the ensuing year, the appointment of which shall not have been otherwise provided for. He shall be a member *ex officio* of every standing committee and every special committee.

President-elect: The president-elect shall perform the duties of the president during any absence or disability of the president; and at the expiration of the one-year term of office of the president the president-elect shall succeed to the office of president. In the event of the death or resignation of the president prior to expiration of his term of office, the vacancy shall not be filled and the duties of the office during the unexpired term shall be performed by the president-elect, and at the expiration of the term the president-elect shall succeed to the office of president in the same manner as if such vacancy in the office of president had not occurred.

Secretary: The secretary shall act as secretary at all meetings of the association, of the board of governors, and of the executive committee, and shall keep a record of all of the proceedings thereof. He shall notify officers and members of the committees of their election or appointment. He shall prepare and maintain a register of all active and inactive members of the State Bar and, subject to direction of the board of governors, shall send out notices of all elections and meetings; and he shall perform all other duties assigned to him by these rules or the By-laws or by the board of governors.

Treasurer: The treasurer shall receive, collect and safely keep, and under the direction of the board of governors disburse, all funds of the association; and render reports

of receipts and disbursements as required. He shall assist the Executive Committee in preparing the annual budget. He shall furnish a surety bond at the expense of the association in such amount as may be required by the board of governors.

Section 3. Delegation of duties. Any duties imposed by these rules or by the By-laws of the association upon the secretary or treasurer may be performed under the supervision of such officers respectively, by assistants or employees of the association.

[fol. 19]

Rule 4

BOARD OF GOVERNORS

Section 1. Composition of board. The affairs of the association shall be managed and directed by a board of governors consisting of the officers of the association and the immediate past-president of the association, who shall be *ex officio* members of the board, and twenty-nine members elected from the several State Bar districts hereinafter defined.

The rights and powers of the *ex officio* members of the board shall be the same as those of elected members.

All past-presidents of the Wisconsin Bar Association and all past-presidents of the State Bar of Wisconsin shall be entitled to floor privileges, but without vote.

Ten of the elected members of the board shall be elected from State Bar District No. 4, four members shall be elected from State Bar District No. 2, three members shall be elected from State Bar District No. 1, and two members shall be elected from each State Bar district other than No. 1, No. 2 and No. 4.

Section 2. State Bar districts. For the purpose of conducting elections of members of the board of governors, the state is divided into nine State Bar districts, as follows:

State Bar District No. 1, comprising the following counties: Green, Kenosha, Racine, Rock and Walworth.

State Bar District No. 2, comprising the following counties: Columbia, Dane, Dodge, Jefferson and Waukesha.

State Bar District No. 3, comprising the following counties: Crawford, Grant, Iowa, Juneau, La Crosse, Lafayette, Monroe, Richland, Sauk and Vernon.

State Bar District No. 4, comprising the following county: Milwaukee.

State Bar District No. 5, comprising the following counties: Calumet, Fond du Lac, Ozaukee, Sheboygan, Washington and Winnebago.

State Bar District No. 6, comprising the following counties: Adams, Green Lake, Langlade, Marathon, Marquette, Portage, Shawano, Waupaca, Waushara and Wood.

State Bar District No. 7, comprising the following counties: Brown, Door, Florence, Forest, Kewaunee, Manitowoc, Marinette, Oconto, and Outagamie.

State Bar District No. 8, comprising the following counties: Barron, Buffalo, Chippewa, Clark, Dunn, Eau Claire, Jackson, Pepin, Pierce, St. Croix, and Trempealeau.

State Bar District No. 9, comprising the following counties: Ashland, Bayfield, Burnett, Douglas, Iron, Lincoln, Oneida, Polk, Price, Rusk, Sawyer, Taylor, Vilas, and Washburn.

Section 3. Term. Qualifications. Nomination and election. The term of office of each member of the board of governors shall be two years, commencing at the beginning of the annual meeting of the association next following his or her election, except as otherwise provided in the By-laws in respect of members elected in the year 1957. No person shall be eligible to serve on the board of governors from any district unless he is an active member of the association and maintains in such district his principal office for the practice of law. No person shall be eligible to election to the board of governors for more than two consecutive terms. Not more than one governor shall be elected from the same county except that in District No. 2

two governors may be elected from Dane County and in District No. 4 ten governors may be elected from Milwaukee County.

The eligibility of any person to serve as a member of the board of governors from any state bar district shall cease upon removal of such person's principal office for the practice of law from such district. Nominations and elections of members of the board of governors shall be conducted in accordance with the provisions of the By-laws.

Section 4. Functions. The board of governors shall have general charge of the affairs and activities of the association. It shall have authority to fix the time and place of the annual meeting of members of the association; to make appropriations and authorize disbursements from the funds of the State Bar in payment of the necessary expenses of the association; to engage and define the duties of employees and fix their compensation; to receive, consider and take action on reports and recommendations submitted by committees, sections and the assembly of members of the association at any annual or special meeting; to arrange for publication of an official State Bar bulletin or journal; to conduct investigations of matters affecting the association, or the practice of law or the discipline of members of the association; to fill vacancies however arising, in the membership of the board of governors, or in any office except the office of president, and in each case the person appointed to fill such a vacancy shall hold for the unexpired term; and to adopt by-laws and regulations, not inconsistent with these rules, for the orderly administration of the association's affairs and activities.

The board of governors shall meet at least four times each year. Fifteen members present at any meeting shall constitute a quorum.

The board of governors shall establish and maintain standing committees having respectively the functions defined in the By-laws, as follows:

Committee on Legal Education and Bar Admissions
Committee on Post-Graduate Education

Committee on Administration of Justice
Committee on Judicial Selection
Committee on Professional Ethics
Committee on Public Services
Committee on Inter-Professional and Business Relations
State Bar District Committees on Grievances
Committee on Legislation
Committee on Legal Aid
Committee on Unauthorized Practice of Law
Committee on State Bar Bulletin

The board of governors shall have authority also to create additional standing committees and such special committees as may be deemed desirable from time to time, and to define the authority and functions of such standing and special committees.

[fol. 20] The board of governors shall establish and maintain sections for carrying on the work of the association, each within its proper field of study defined in its by-laws, as follows:

Section of Corporation and Business Law
Section of Family Law
Section of House Counsel
Section of Insurance, Negligence and Workmen's Compensation Law
Section of Labor Relations Law
Section of Military Law
Section of Real Property, Probate and Trust Law
Section of Taxation

Each section shall consist of members who voluntarily enroll therein because of a special interest in the particular field of law to which the section is dedicated. New sections may be established and existing sections may be consolidated or discontinued by the board of governors from time to time. Each section shall be governed by by-laws not inconsistent with State Bar Rules or State Bar By-laws. Section by-laws and amendments thereto shall become effective upon approval of the board of governors.

Whenever any committee or section of the association expresses publicly any conclusion or opinion not previously approved by the board of governors or by the members of the association, such expression shall indicate that the conclusion or opinion is that of the section or committee from which it emanates, rather than the conclusion or opinion of the State Bar.

The members of the board of governors shall receive no compensation for services to the association, but they and also the members of committees and the officers and directors of sections may be reimbursed for necessary expenses incurred in the performance of their duties.

Rule 5

EXECUTIVE COMMITTEE

Section 1. Number of Members. Selection. There shall be an executive committee consisting of the president, the president-elect, the immediate past president and five additional members selected annually by the board of governors from among their number.

Section 2. Chairman. Minutes of meetings. The president shall preside at meetings of the executive committee and the secretary shall keep minutes of its proceedings. The minutes of each meeting of the executive committee shall be submitted to the next meeting of the board of governors.

Section 3. Powers. Unless otherwise ordered by the board of governors, the executive committee may exercise all the powers and perform all the duties of the board between meetings of the board; but shall not amend the By-laws, make rules or regulations governing nominations or elections, or prescribe regulations for proceedings before grievance committees. The executive committee shall prepare an annual budget for submission to the board of governors and shall perform such other duties as the board of governors may from time to time prescribe.

Section 4. Meetings. The executive committee shall meet at the call of the president, or upon call of the secre-

tary upon written application of three members, upon forty-eight hours' notice by mail, telegraph or telephone. Five members shall constitute a quorum. Action of a majority of the members present at a meeting shall constitute action by the committee.

Rule 6

MEETINGS OF THE ASSOCIATION

Section 1. Annual meeting. There shall be an annual meeting of members of the association during the month of June in each year. The board of governors shall determine the time and place of the annual meeting, and shall arrange therefor a suitable program which shall include an address by the president. Reports of officers and reports of proceedings of the board of governors subsequent to the last previous annual meeting shall be presented to the meeting.

Section 2. Special meetings. Special meetings of the members of the association may be called by the board of governors or the president; and shall be called by the secretary whenever he receives a petition signed by not less than 300 members of the association requesting such meeting and specifying the purpose thereof, and the meeting shall be convened accordingly within forty-five days after the secretary receives such petition. It shall be the duty of the board of governors to fix the time and place of every special meeting, to make suitable arrangements therefor, and to cause the secretary to give notice thereof to the members.

Section 3. Quorum. One hundred active members present in person at any annual or special meeting shall constitute a quorum. No member shall be entitled to be represented by proxy.

Section 4. Notice. Notice of the time and place of every annual meeting of members shall be mailed by the secretary to each active member of the association or published in the official bulletin of the State Bar at least thirty days prior to the meeting.

Notice of the time, place and purpose of every special meeting of members shall be mailed by the secretary to each active member of the association or published in the official bulletin of the State Bar at least ten days prior to the meeting.

Section 5. Recommendations to board of governors. The members present in person at any annual or special meeting of members of the association, herein also referred to as the "assembly", may consider and adopt any proposal pertinent to the purposes of the association; provided that [fol. 21] every such proposal which is adopted shall constitute a recommendation from the assembly to the board of governors, and shall be referred accordingly by the presiding officer to the board of governors for such action as the board of governors may deem proper, except as otherwise required in the case of a direction for a referendum under the provisions of Rule 7, or in the case of a proposal for amendment of these rules.

Rule 7

REFERENDUM PROCEDURE

Section 1. Governors may initiate. The board of governors may at any time, by the affirmative vote of two-thirds of its members, refer to the active members of the association for determination by mail ballot, any question of association policy.

Section 2. Assembly may initiate. The board of governors shall, in like manner, submit for determination by the active members of the association, any question of association policy, including proposed changes in the Rules or By-laws of the association, whenever directed so to do by resolution adopted at any annual or special meeting of the association by the affirmative vote of not less than two hundred members; provided, that no such resolution directing the board of governors to propose changes in the Rules shall be effective unless adopted at two consecutive meetings of the assembly.

Section 3. Members may initiate by petition. The board of governors shall, in like manner, submit the determina-

tion, by the members of the association. any question of association policy, including proposals for changes in the Rules or By-laws, whenever directed so to do by a petition signed by not less than three hundred active members of the association.

Section 4. Procedure. Ballots for use in any such referendum shall be prepared, distributed, returned and counted in accordance with regulations prescribed by the board of governors. The result of a referendum, as determined by a majority of the votes cast, when duly ascertained shall be published by the board of governors in the official Bar Bulletin, and shall control the action of the association, the board of governors, the officers, sections and committees.

Rule 8

DISBURSEMENTS

The board of governors shall make necessary appropriations for disbursements from the funds in the treasury to pay all necessary expenses of the association, its officers and committees. It shall be the duty of the board of governors to cause proper books of account to be kept and to procure an annual audit thereof by a certified public accountant. At each annual meeting of the association the board of governors shall present a financial statement showing assets, liabilities, receipts and disbursements of the association; and a copy of such statement shall be filed with the Clerk of the Supreme Court and published in the official publication of the association prior to the annual meeting.

Rule 9

RULES OF PROFESSIONAL CONDUCT

The rules of professional conduct set forth from time to time in the Canons of Professional Ethics of the American Bar Association, as supplemented or modified by pronouncements of the court, shall be the standards governing the practice of law in this state.

Rule 10

STATE BAR DISTRICT GRIEVANCE COMMITTEES

Section 1. Composition and selection. There shall be a State Bar District Committee on Grievances, herein called "district committee", for each of the State Bar districts defined in Rule 4, consisting of not less than three nor more than fifteen members of the association residing in such district. The State Bar District in which the members of a district committee reside is herein called the "district of the committee". The members of each district committee and the chairman thereof shall be appointed by the president of the association with the approval of the members of the board of governors in the district of the committee. Initially one-third of the members of the committee shall be appointed for a term of one year, one-third for a term of two years, and one-third for a term of three years; and thereafter the term of office of each successor member shall be three years.

Section 2. Duties. It shall be the duty of each district committee to receive and investigate complaints of alleged misconduct on the part of lawyers residing or having their principal offices in the district of the committee, and also misconduct committed within the district by any lawyer regardless of residence. The committee shall have responsibility also, to the extent herein defined, for investigating or causing to be investigated all complaints of professional misconduct on the part of members of the State Bar residing or having their principal offices outside the district of the committee, whenever a request for such an investigation is received from the board of governors, executive committee or president of the association, or from the State Bar Commissioners, or from a judge of any court in this state, or from the district attorney of any county in the state. The committee shall have responsibility also for investigating and reporting on the merits of any petition for reinstatement to the practice of law referred to the committee under the provisions of Sections 6 or 7 of this Rule.

Section 3. Committee procedure. The work of the committee shall be carried on under the supervisory control of the board of governors. The committee shall meet on call of the chairman; a majority of the members shall constitute a quorum; and each committee member shall perform such part of the investigation in any case as may be delegated to him by the chairman. The committee may also utilize in any investigation the services of investigators and counsel provided by the board of governors.

[fol. 22] Whenever it appears, upon preliminary consideration of a complaint, that the facts do not support a charge of misconduct and do not warrant disciplinary action, the committee may dismiss the complaint without proceeding further, but in that event shll notify the complainant accordingly. If it appears upon such preliminary consideration that the complaint may have merit and is worthy of a further investigation, the committee shall cause the complaint to be reduced to writing, and also to be signed by the complainant if practicable. A copy shall forthwith be sent by certified mail to, or personally served upon, the person complained of, herein called the "respondent." It shall be the respondent's duty to submit to the committee within fifteen days after the date of mailing such complaint his written answer thereto, containing a full statement of the material facts in relation to the acts of misconduct alleged in the complaint; and it shall be the respondent's duty also, if required by the committee to do so, to appear in person before the committee and answer oral or written interrogatories concerning the acts of misconduct alleged in the complaint; and any deliberate failure on the part of the respondent to submit to the committee his written answer to a complaint, or to appear before the committee and answer interrogatories when requested by the committee to do so, and any willful misrepresentation or concealment of material facts in relation to the matter complained of, shall be grounds for disciplinary action. Before the investigation is concluded in any case the respondent shall be afforded an opportunity to appear before the committee and to present evidence on his behalf.

If after investigation in any case the committee finds that the facts pertaining to the matter complained of do

not merit disciplinary action, it shall file a written report to that effect and shall notify the complainant, the respondent and the secretary of the State Bar that the complaint has been dismissed. If after investigation in any case the committee concludes that the facts warrant a complaint by the State Bar Commissioners under applicable provisions of the Wisconsin statutes, the committee shall make a report of its proceedings, including a summary of the material facts and the recommendations of the committee; and such report shall be filed with the State Bar Commissioners and a copy shall be filed with the secretary of the State Bar.

In the case of any complaint against a respondent residing or having his principal office outside the district of the committee, which is referred to a district committee for investigation, the committee's responsibility shall be limited to investigation thereof within the district of the committee; and the information obtained from such investigation and the files pertaining thereto shall be disposed of as follows:

(a) In the case of complaints referred by the board of governors or executive committee or president, the information and files shall be transmitted to the board of governors.

(b) In the case of complaints referred by the State Bar Commissioners, the information and files shall be transmitted to the State Bar Commissioners.

(c) In the case of complaints referred by any judge or district attorney, the information and files shall be transmitted to the chairman of the district committee for the district in which the person complained of resides or has his principal office, unless otherwise ordered by the board of governors or executive committee; and the latter district committee shall proceed with the matter by completing the investigation and making its report.

Section 4. H[illegible]ings not open to public. Files confidential. The public shall not be admitted to any hearing or investiga-

tion before the committee in relation to charges of professional misconduct; and all of the committee records and files pertaining to such charges in any case shall be treated as confidential, and shall not be open to inspection by other persons, except in accordance with such regulations as may be prescribed by the board of governors, or as may be ordered by the Supreme Court.

Section 5. Improper conduct of judicial officers. It shall be the duty of each district committee to receive complaints of improper conduct on the part of members of the judiciary within the district of the committee. Upon receipt of any such complaint the committee shall make such investigation as it deems appropriate, and shall in its discretion report to the board of governors its findings and recommendations for such action as the committee deems proper.

Section 6. Petition for reinstatement. Investigation. Whenever any person who has been disbarred from the practice of law or suspended for professional misconduct petitions the court for reinstatement, a copy of the petition shall be filed by the petitioner with the secretary of the State Bar; and the board of governors thereupon shall cause an investigation of the petitioner's eligibility for reinstatement to be made by a district committee. It shall be the duty of the petitioner to appear before the committee in person, if requested to do so, and to answer oral or written interrogatories relative to his eligibility for reinstatement; and failure on his part to appear and answer interrogatories, or any concealment or misrepresentation in that regard shall be grounds for denying the petition. Upon completion of the investigation, the report of the committee containing its findings and recommendations with respect to the petitioner's eligibility for reinstatement, and also the recommendations of the board of governors with respect thereto shall be filed by the board of governors with the Clerk of the Court and a copy thereof shall be filed with the secretary of the State Bar; and hearing upon the petition shall be deferred until such report and recommendations shall have been filed. The petitioner shall be required to reimburse the State Bar for the reasonable expense of the investigation.

Section 7. Petition for reinstatement after suspension for non-payment of dues. Whenever any member of the State Bar applies to the association for reinstatement after having been suspended for non-payment of membership dues, the application shall not be granted if it appears that the applicant's membership dues have been in arrears for three consecutive years, unless reinstatement is ordered by the court. If the applicant in such case petitions the court [fol. 23] for reinstatement, the petition shall set forth a description of the petitioner's business and professional activities during the period of suspension and shall state whether or not such activities have included the practice of law and, if so, the particulars in that regard; and the petitioner shall file a copy of the petition with the secretary of the State Bar and shall pay the full amount of membership dues then in arrears, including accrued penalties; and thereupon the board of governors shall cause an investigation to be made by a district committee concerning the petitioner's business and professional activities during the period of his suspension and his eligibility for reinstatement as a member of the State Bar. It shall be the duty of the petitioner to appear before the committee in person, if requested to do so, and to answer oral or written interrogatories relative to his eligibility for reinstatement; and failure on his part to appear and answer interrogatories, or any concealment or misrepresentation in that regard, shall be grounds for denying the petition. Upon completion of such investigation the committee's report containing its findings and recommendations with respect to the petitioner's eligibility for reinstatement, and also the recommendations of the board of governors with respect thereto, shall be filed by the board of governors with the Clerk of the Court; and hearing of the petition for reinstatement shall be deferred until such report and recommendations shall have been filed. The petitioner shall be required to reimburse the State Bar for the reasonable expense of the investigation.

Section 8. Petition for late enrollment. No person required by the provisions of Rule 2 to enroll in the State Bar who fails to enroll within one year after becoming eligible

for enrollment shall be permitted to enroll thereafter unless enrollment is ordered by the court. If the applicant in such case petitions the court for an order directing enrollment, the petition shall set forth a description of the petitioner's business and professional activities during the period of default in enrollment and shall state whether or not such activities have included the practice of law and, if so, the particulars in that regard; and the petitioner shall file a copy of the petition with the secretary of the State Bar, and thereupon the board of governors shall cause an investigation to be made by a district committee concerning the petitioner's business and professional activities during the period of his default in enrollment. It shall be the duty of the petitioner to appear before the committee in person, if requested to do so, and to answer oral or written interrogatories relative to such activities, and failure on his part to appear and answer interrogatories, or any concealment or misrepresentation in that regard, shall be grounds for denying the petition. Upon completion of such investigation the committee's report containing its findings and recommendations with respect to the petitioner's activities during the period of default, and also the recommendations of the board of governors with respect thereto, shall be filed by the board of governors with the clerk of the court; and hearing of the petition for enrollment shall be deferred until such report and recommendations shall have been filed. The petitioner shall be required to reimburse the State Bar for the reasonable expense of the investigation.

Section 9. Committee expenses. Members of any district committee shall be entitled to reimbursement for actual expenses incurred in connection with their duties, and the chairman shall be entitled to employ, at the expense of the State Bar such clerical help and reportorial service in any matter before the committee as may be authorized by the board of governors or the executive committee.

Section 10. Statutory authority of State Bar Commissioners and Milwaukee Bar Association not affected. It is not intended that those Rules shall supersede the authority conferred by section 256.28 of the Wisconsin Statutes on the

State Bar Commissioners or on the Milwaukee Bar Association.

Rule 11

AMENDMENT

Section 1. Amendment of Rules. Proposals for amendment or abrogation of provisions of the State Bar Rules may be presented to the court by (i) petition of the board of governors; or (ii) petition of the assembly in respect of changes approved by vote of a majority of members present at two consecutive meetings of the association. Hearing upon such a petition will be pursuant to notice in such manner as the Court may direct.

Section 2. Amendment of By-laws. The provisions of the By-laws of the State Bar of Wisconsin appended hereto shall be subject to amendment or abrogation by (i) resolution adopted by vote of two-thirds of the members of the board of governors, or (ii) action of the members of the association expressed through the referendum procedure defined in Rule 7. When any change in the By-laws has been made by the board of governors the secretary shall publish notice thereof, including a copy of the amendatory resolution, in the official bulletin of the State Bar, and he shall file a certified copy thereof with the clerk of the court. A petition for review of any such change in the By-laws will be entertained by the court if signed by twenty-five or more active members of the association and filed with the clerk of the court within sixty days after publication of notice of such change. Hearing upon such a petition will be pursuant to notice in such manner as the court may direct.

Rule 12

EFFECTIVE DATE OF RULES

The State Bar Rules and also the provisions of Article I to VII inclusive of the By-laws of the State Bar of Wisconsin appended to these rules shall take effect on January 1, 1957. The legal existence of the association shall be deemed to have commenced on June 22, 1956.

[fol. 24]

State Bar By-laws

Article I

Membership

Section 1. Membership register. The association shall maintain a membership register for the enrollment of members of the State Bar, which shall contain as to each member a record showing his address, the date of his registration, the class of his original membership and each subsequent change of membership status, and such other information as may be required by the board of governors from time to time.

Every member shall enroll in the State Bar by signing and filing in the office of the association a registration card showing the following information concerning the registrant:

(a) Full name.

(b) Residence address.

(c) Office address. Location of principal office.

(d) Date of admission to practice in Wisconsin.

(e) Date of admission to practice in any state or states other than Wisconsin.

(f) Date and place of birth; and in the case of a naturalized person, the date and place of naturalization.

(g) Particulars regarding any previous suspension or revocation of right to practice law in any state or country.

(h) Name of law school and year of graduation.

Every change after enrollment in respect of any of the matters above specified shall be promptly reported to the secretary. Communications from the association to any member shall be sent to the latest address furnished by such member. At the time of enrollment of each member admitted to practice after these rules take effect, the associa-

tion shall deliver to the new member a copy of the lawyer's oath set forth in sec. 256.29 Wisconsin Statutes, as follows:

"I will support the constitution of the United States and the constitution of the state of Wisconsin;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;

"I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with his business except from him or with his knowledge and approval;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So help me God."

Section 2. Membership dues. Membership dues for each calendar year shall be due and payable to the treasurer on the second day of January of such year. Every active member shall pay annual dues of fifteen dollars, except that for the calendar year of admission to the Bar of this state or any other state and for the next succeeding four calendar years the dues shall be eight dollars per year. Every inactive member shall pay annual dues of five dollars. In the case of persons admitted to practice law in this state after

the State Bar Rules become effective, membership dues for the full calendar year in which such admission occurs shall be paid at the time of enrollment in the State Bar. The board of governors may exempt any member serving in the armed forces of the United States at the beginning of any year from the payment of membership dues for such year provided satisfactory proof of exemption is submitted to the secretary prior to April 1 of such year. (As amended February 21, 1957)

Section 3. Penalty for non-payment of dues. If the membership dues of any member for any year are not paid prior to the first day of February of such year, notice of non-payment shall be mailed to the member at his business address shown in the membership register. If such dues are not paid prior to the first day of March of such year, thereupon a second notice of the arrears shall be sent to the member by registered or certified mail. On the first day of April in each year the secretary shall deliver to the board of governors a list of all members whose dues remain unpaid after notification in the manner aforesaid, accompanied by proof of mailing the required notice of arrears in each case. Thereupon the board of governors by resolution shall suspend the membership of each such dues-delinquent member, and shall file with the clerk of the Supreme Court a certified copy of the resolution declaring the suspension, and shall mail a copy thereof to each person whose membership has been thereby suspended. Whenever a member so suspended for non-payment of membership dues makes full payment of the amount owing, and in addition thereto the sum of five dollars as a penalty, he shall be re-instated as a member by the board of governors, and the fact of reinstatement shall be certified by the secretary to the Clerk of the Supreme Court. Provided however in the case of any person whose membership dues shall have been in arrears for a period of three or more consecutive years, no application for reinstatement shall be granted unless ordered by the court pursuant to the provisions of Section 7 of State Bar Rule 10. Provided further however, that no person whose membership is suspended for the non-payment of dues shall be entitled to practice law during the period of such suspension.

Article II

OFFICERS

Section 1. Nominations. The president-elect, the secretary and the treasurer of the State Bar shall be elected from a list of candidates nominated in the manner herein prescribed. A committee of nine members to nominate candidates for said offices to be voted on at the next annual election shall be appointed by the president of the association with the approval of the board of governors on or before the first day of September in each year. Such nominating [fol. 25] committee shall consist of one governor from each of the State Bar districts defined in the State Bar Rules. The report of the committee shall be filed in the office of the secretary on or before the thirty-first day of January of the year of the election. Such report shall name two or more candidates nominated by the committee for the office of president-elect, two or more candidates nominated for the office of secretary and two or more candidates nominated for the office of treasurer. Other persons may be nominated for any of said offices by petition signed in the case of each candidate by not less than fifty active members of the association, and filed in the office of the secretary on or before the second Friday of April of the year of the election, provided that before the filing of such petition a statement shall be endorsed thereon by the nominee to the effect that he consents to nomination for the office designated in the petition.

Section 2. Voting and canvass of ballots. The provisions of Sections 4 to 8 inclusive of Article III of these By-laws relating to the election of members of the board of governors shall be applicable also to the election of officers.

Section 3. Commencement of term of office. Officers of the association shall take office at the conclusion of the annual meeting next following their election.

Section 4. Other officers. The board of governors may appoint one or more assistant secretaries and one or more assistant treasurers, as may be required from time to time.

Section 5. Location of principal office. The principal office of the association shall be located in the city of Madison, Wisconsin.

Section 6. Interim officers and governors. The officers and board of governors of the association to serve during the period from the effective date of the State Bar Rules until their successors are elected and take office will be appointed by the Court.

Article III

BOARD OF GOVERNORS

Section 1. Qualifications of electors. Each member of the board of governors shall be elected by the active members of the State Bar eligible to vote in the State Bar District in which such member of the board of governors has his principal office for the practice of law.

Section 2. Term. At the annual election in the year 1957 members of the board of governors, herein also called "governors", shall be elected in the several State Bar Districts as follows: One governor shall be elected for a term of one year and one governor shall be elected for a term of two years in each of the Bar Districts numbered as follows: No. 3, No. 5, No. 6, No. 7, No. 8 and No. 9; one governor shall be elected for a term of one year and two for a term of two years in Bar District No. 1; two governors shall be elected for a term of one year and two for a term of two years in Bar District No. 2; five governors shall be elected for a term of one year and five for a term of two years in Bar District No. 4.

At the annual election on each year subsequent to 1957 the members entitled to vote in each Bar District shall elect a governor for a term of two years to succeed each governor from such District whose term of office expires in that year.

Section 3. Nomination petitions. Nominations for the office of governor shall be by petition signed in respect of each nominee by not less than ten persons entitled to vote for such candidate. Blank forms for that purpose shall be supplied by the secretary of the association on request.

Nomination petitions for candidates to be voted on at the annual election in any year shall be filed in the office of the secretary not later than the second Friday of April of such year, provided that before the filing of such petition a statement shall be endorsed thereon by the nominee to the effect that he consents to nomination for the office designated in the petition. No nominating petition for governor shall be filed on behalf of any member practicing in the same county in which another member is a governor whose term does not expire at the next annual meeting.

Section 4. Voting list. On the last Friday of April in each year the voting list shall close for the election in that year. Every active member of the association in good standing on that date shall be entitled to vote in the State Bar District in which his principal office for the practice of law is located, for officers of the State Bar and for the governor or governors for such district to be elected that year.*

Section 5. Mailing of ballots. On or before the first Friday of May in each year the secretary shall prepare and mail two ballots to each active member of the State Bar entitled to vote at the annual election. One form of ballot sent to persons entitled to vote in each State Bar District shall contain the names of the nominees for the several offices of the State Bar to be filled at the annual election, and a separate form of ballot shall contain the names of the nominees for the office of governor from such district. If any such person entitled to vote in such election fails to receive his ballots, or if it appears that any such ballot has been lost or destroyed, a new ballot shall be furnished to him by the secretary. The third Friday of May in each year shall be the last day for voting in such election and no ballots received after that date shall be counted.

Section 6. Voting of ballots. No ballot shall be counted unless returned to the office of the secretary of the association on or before the last day for voting, in an envelope furnished by the secretary marked "Ballot".*

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* As amended April 12, 1957.

Section 7. Checking and custody of ballots. The secretary shall have custody of the ballots after they are voted until they are canvassed. As such ballots are received by the secretary they shall be consecutively numbered and segregated as to State Bar Districts from which received. The envelope containing the ballot shall be retained by the secretary unopened until the tellers canvass the ballots.*

Section 8. Canvass of ballots. The ballots shall be canvassed by three tellers appointed by the president, with the assistance of a certified public accountant selected by the tellers. The tellers may delegate to such certified public [fol. 26] accountant the duty of counting and tabulating the votes cast for each candidate and may accept the results of such count as certified by such accountant. The candidate receiving the highest number of votes for each office shall be declared elected. In case of a tie vote the tellers shall determine the successful candidate by lot drawn by the candidates or by the tellers if authorized by the candidates. Promptly upon the conclusion of the canvass the tellers shall certify the results to the secretary of the association, who shall forthwith announce the result of the election and notify each candidate as to whether or not he has been elected. Upon completion of the canvass the tellers shall replace all ballots in a locked receptacle where they shall thereafter remain subject to the further order of the board of governors.

Section 9. Meetings of board of governors. There shall be a regular meeting of the board of governors in each year at the time of the annual meeting of members of the State Bar, and also at the time of the annual mid winter meeting of members of the State Bar. There shall be a regular meeting also during the month of April and during the month of September in each year. The meetings in the months of September and April shall be on the second Friday of each of those months unless changed to other dates in said months by action of the board of governors. The time and place of every meeting of the board of governors shall be determined by the board except special meetings called by the president.

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* As amended April 12, 1957.

Special meetings of the board may be held at any time upon call of the president, and shall be called by him upon written request signed by three members of the board. Notice of the time and place of regular and special meetings of the board shall be given to each member by the secretary by mail, telegram or telephone at least five days before the meeting. At any regular or special meeting of the board any business may be transacted which is within the power of the board, whether or not specified in the call or notice of the meeting. Action of the board may be taken without a meeting by resolution signed by a two-thirds majority of the members of the board, provided that such resolution shall have been first submitted by the proponents thereof to all of the members of the board.

Section 10. Members of Judicial Council. Upon expiration of the term of office of each member of the judicial council selected by the Wisconsin Bar Association pursuant to the provisions of sec. 251.181 Wisconsin Statutes, his successor in such office shall be elected from the active members of the State Bar in the manner provided for the election of officers.

Section 11. American Bar Association delegates. Upon expiration of the term of office of each member of the House of Delegates of the American Bar Association, selected by the Wisconsin Bar Association, his successor in such office shall be appointed by the board of governors, and every vacancy thereafter occurring in such office shall be filled in like manner.

Article IV

STANDING COMMITTEES

Section 1. Appointment. Number of members. Term. Each of the standing committees referred to in this article shall consist of nine members, unless a different number be fixed by the board of governors; and the members of each such committee shall be appointed by the president with the consent of the board of governors, for a term of three years, so arranged that the term of office of only one-third of the members shall expire in any year. The chairman of each committee shall be designated by the president for a term of one year. In the event of any vacancy in any

committee it shall be filled by appointment by the president for the unexpired term. Members of committees shall serve until the appointment of their respective successors. Unless otherwise specified in these By-laws or by vote of the board of governors, a majority of the members of any committee shall constitute a quorum for the transaction of business. Each committee shall keep a record of its meetings and proceedings and shall submit an annual report to the board of governors. The board of governors may assign powers or duties to any standing committee in addition to those hereinafter set forth.

Section 2. Committee on legal education and bar admissions. This committee shall make continuing studies of the curricula and teaching methods employed in law schools, and of standards and methods employed in determining the qualifications of applicants for admission to the bar; and whenever requested by the State Bar Commissioners shall assist in the investigation of the qualifications of persons seeking admission to the bar.

Section 3. Committee on post-graduate education. This committee shall formulate and promote programs designed to afford to the members of the State Bar suitable opportunities for acquiring additional professional knowledge, training and skill, through publications, lectures and discussions at regional meetings of association members and law institutes, and through correspondence course study.

Section 4. Committee on administration of justice. This committee shall study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.

Section 5. Committee on judicial selection. This committee shall study and collect information pertaining to judicial selection, tenure and compensation, including retirement pensions, and shall report from time to time to the association with respect thereto.

Section 6. Committee on professional ethics. This committee shall formulate and recommend standards and meth-

ods for the effective enforcement of high standards of ethics and conduct in the practice of law; shall consider [fol. 27] the Canons of Ethics of the legal profession and the observance thereof, and shall make recommendations for appropriate amendments thereto. The committee shall have authority to express opinions regarding proper professional conduct, upon written request of any member or officer of the State Bar.

Section 7. Committee on public services. This committee shall prepare and present to the board of governors plans for advancing public acceptance of the objects and purposes of the association; and shall have responsibility for the execution of such plans as are approved by the board of governors. Such plans shall include arrangements for disseminating information of interest to the public in relation to the functions of the departments of government, the judicial system and the bar; and to that end the committee may operate a speakers' bureau and employ the facilities of the public press and other channels of public communications.

Section 8. Committee on inter-professional and business relations. It shall be the duty of this committee to serve as a liaison agency between the legal profession and other professions and groups with whom the bar is in contact in order to interpret to such professions and groups the proper scope of the practice of law.

Section 9. Committee on legislation. This committee shall study all proposals submitted to the Wisconsin Legislature or the Congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals.

Section 10. Committee on legal aid. This committee shall promote the establishment and efficient maintenance of legal aid organizations equipped to provide free legal services to those unable to pay for such service; shall study the administration of justice as it affects persons in the low income groups; and shall study and report on methods of making

legal service more readily available to persons of moderate means, and shall encourage and assist local bar associations in accomplishing this purpose.

Section 11. Committee on unauthorized practice of the law. This committee shall keep itself and the association informed with respect to the unauthorized practice of law by laymen and by agencies, and the participation of members of the bar in such activities, and concerning methods for the prevention thereof. The committee shall seek the elimination of such unauthorized practice and participation therein on the part of members of the bar, by such action and methods as may be appropriate for that purpose.

Section 12. Committee on State Bar Bulletin. This committee shall assist and advise the officers of the association and the board of governors in matters pertaining to the production and publication of the *Wisconsin State Bar Bulletin*, the *Wisbar Letter*, the *Supreme Court Calendar Service* and such other periodical publications of the State Bar as may be authorized by the board of governors from time to time.

Article V

SECTION ORGANIZATION AND ACTIVITIES

Section 1. Establishment, consolidation and discontinuance of sections. Upon approval of an application for the establishment of a new section, the board of governors, by vote of a majority of its members may establish such a section dedicated to a field of law not committed to any other section or committee of the association. Every application to the board of governors for the establishment of a section shall set forth:

(a) The field of law to which the proposed section is to be dedicated, which shall be within the purposes of the State Bar and outside the field of law committed to any existing section or committee of the association.

(b) A statement of the need for the proposed section.

(c) The proposed by-laws for the government of such section.

(d) The names of the several committees, if any, of the proposed section.

(e) A list of members of the association who have signified their intention of applying for membership in the proposed section.

An application for the consolidation of existing sections shall set forth the information required in the case of an application for establishing a section. Such an application may be granted by the board of governors in its discretion, by vote of two-thirds of the members.

A section may be discontinued by vote of a majority of the members of the board of governors, but only after notice by mail to the members of such section.

Section 2. Membership of sections. Any member of the State Bar shall be entitled at his election to enroll in any section.

Section 3. Section officers and council. Each section shall have a chairman and council and such other officers as the section by-laws may provide. The council of a section shall consist of the officers *ex officio* and such other members as may be provided in the by-laws. No change in the by-laws of any section shall be effective until approved by the board of governors.

Section 4. Section dues. The members of any section may be required to pay section dues in such amount and for such purposes as the section, with the approval of the board of governors, may from time to time determine.

Section 5. Section meetings. There shall be a meeting of members of each section immediately preceding or during the period of each annual meeting of the association, as the board of governors may direct. There shall be a meeting of the members of each section also immediately preceding or during the period of each annual mid winter meeting of the association, as the board of governors may direct.

Section 6. Publication of proceedings of sections. The proceedings of any section meeting may be published in the discretion of the board of governors.

[fol. 28] *Section 7. Reports.* Each section shall submit to the board of governors prior to the annual meeting of the association in each year a report of the activities of the section during the year.

Section 8. Expenses. Expenditures out of the dues of sections shall be made only by direction of the council of the section; and the treasurer of the State Bar shall pay out of such dues only such amounts as the chairman of the section shall certify to have been so authorized.

Article VI

EXECUTIVE DIRECTOR

The board of governors may appoint an executive director to assist the board of governors and officers of the association in the performance of their respective duties. He shall devote his full time to the affairs of the State Bar. It shall be a part of his duties to assist the chairmen of committees and sections of the State Bar in performing administrative functions incident to the work of committees and sections, as directed by the board of governors or the president. His compensation shall be fixed by the board of governors; and he shall perform such duties as the board may from time to time prescribe.

Article VII

AMENDMENT

The provisions of these By-laws shall be subject to amendment or abrogation by (i) resolution adopted by vote of two-thirds of the members of the board of governors, or (ii) action of the members of the association expressed through the referendum procedure defined in Rule 7. When any change in the By-laws has been made, the secretary shall publish notice thereof, including a copy of the amendatory resolution, in the official bulletin of the State Bar, and he shall file a certified copy thereof with

the clerk of the Supreme Court. A petition for review of any such change in the By-laws will be entertained by the court if signed by twenty-five or more active members of the association and filed with the clerk of the court within sixty days after publication of notice of such change. Hearing upon such a petition will be pursuant to notice in such manner as the court may direct.

Adopted by Order of the Supreme Court of the State of Wisconsin. Effective January 1, 1957.

Continued by Decision of Court December 22, 1958.

August Term, 1958

STATE OF WISCONSIN: IN SUPREME COURT

IN RE INTEGRATION OF THE BAR

Original proceeding for the continuation of the integrated Bar. This matter is before the court on its order of December 7, 1956 directing the Board of Governors of the State Bar of Wisconsin to report on the functioning of the State Bar with their recommendations with respect to any amendment of its Rules and By-laws, in the light of experience thereunder and the continuation of the State Bar of Wisconsin under said Rules and By-laws, with or without amendment, on a more permanent basis beyond December 30, 1958. Upon the filing of the report of the Board of Governors due notice was given to all members of the State Bar of Wisconsin of a hearing thereon at which any member and any local Bar association could appear and present his or its views relating to the amendments of the Rules and By-laws and the continuation of the integrated State Bar.

The hearing was held on November 21, 1958. The report of the Board of Governors was presented and orally argued by Robert D. Johns and oral arguments or briefs in opposition to the continuance of the integrated Bar or for changes in the Rules and in the By-laws were made or filed by Trayton L. Lathrop, Arnold C. Otto, Milwaukee Junior Bar Association, Meyer Papermaster, Samuel P. Murray, Thomas P. Maroney, Brooke Tibbs, and others.

Per Curiam. The issue before this court is whether the integrated State Bar of Wisconsin should be continued and if so what amendments, if any, to the Rules and By-laws should be made. The integrated Bar in this state has existed for almost two years. Its birth in Wisconsin was an experiment which this court had considered on several previous occasions and finally decided ought to be tried for an initial period of two years.

The history of integration is adequately set forth in the previous decisions of this court. In re *Integration of Bar Case* (1943), 244 Wis. 8, 11 N.W. (2d) 604; In re *Integration of Bar* (1946), 249 Wis. 523, 25 N.W. (2d) 500; In re *Integration of Bar* (1956), 273 Wis. 281, 77 N.W. (2d) 602. The present Rules and By-laws of the State Bar of Wisconsin were adopted and promulgated and the Bar integrated by order of this court on December 7, 1956, to be effective for two years commencing January 1, 1957, subject to amendment as provided in the Rules and By-laws or at any time by order of this court. See Integration of the Bar (1956), 273 Wis. vii. (Order, Opinion, State Bar Rules and State Bar By-laws.)

During these two years the Board of Governors made two minor changes in the By-laws—one clarifying the provisions relating to dues for younger members, and the other simplifying the election procedure. Both changes were reported to this court and no petition for review by [fol. 29] the members of the State Bar was filed expressing objection to these amendments as provided in Rule 11, Sec. 2.

Under integration the State Bar has increased its services to the lawyers of this state, promoted the high standards of the members of the profession, and increased its contribution to public service and to the administration of law and justice. The State Bar is in sound financial condition and its membership is greater in number than was reasonably expected. The acceptance of the integrated State Bar by its members and by the public during these two years has been satisfactory. At this point we wish to commend the Board of Governors for the adoption of the legislative procedure and working rules proposed by

Alfred E. LaFrance' committee whereby the State Bar can fulfill its responsibility in legislative matters with fairness to all members and for the adoption of the resolution providing that any member may present any matter to the Board of Governors at any time. The objections and fears of the opponents to integration have not materialized. The arguments advanced for not continuing the integrated Bar are the same or similar to the arguments heretofore considered and disposed of by this court. None of them is grounded upon the experience of the last two years with the integrated Bar which has functioned well and successfully. Perhaps this was to be expected. At the time of the integration of the Bar there were 24 other states in which the Bar had been integrated and no supreme court, to our knowledge, which integrated the Bar of its state by rule of court has found the integrated Bar to be unworthy of its existence. As recently as 1955 the Alaska Bar Association was integrated by the Alaska Territorial Legislature. One of its contributions was the preparation of a proposed article on the judiciary for submission to the Constitutional Convention. Many of its proposals are now found in Article IV of the Constitution of Alaska. See A Model Judiciary for the 49th State, Stewart, Journal of the American Judicature Society, August 1958, Vol. 42, No. 2. Annotations on the problems of integration are found in 114 A.L.R. 161 and 151 A.L.R. 617.

We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice. Members of the legal profession by their admission to the Bar become an important part of that process and this relationship is characterized by the statement that members of the Bar are officers of the court. An independent, active and intelligent Bar is necessary to the efficient administration of justice by the court. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the Bar. The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial

power that this court should continue to exercise its supervisory control of the practice of the law.

The integration of the Bar is no more undemocratic than the requirement of learning and good moral character of all who seek the privilege of practicing law. All members had the same opportunity and have freely chosen a profession subject traditionally to discipline and control by the courts. It is not undemocratic to require those who are privileged to practice law and are entrusted with the duty to secure or protect the property, rights and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group and to increase the effectiveness of their service to the public. The integrated Bar has been defined as "the process by which every member of the Bar is given an opportunity to do his share in carrying out the public service of the Bar and obliged to bear his portion of the responsibility." Most objections have centered around the obligation to bear a portion of the responsibility. In the nature of things every privilege has a correlative obligation.

The integrated Bar does not destroy either the independence of the Bar or of the individual lawyers. The State Bar of Wisconsin was not intended to control and there is no evidence or intimation that it has controlled or attempted to control the thinking of any of its members. When the State Bar of Wisconsin through its Board of Governors, an elected representative policy-making body, duly decides a policy within its province on behalf of the State Bar everyone understands or should understand the policy is that of the State Bar as an entity separate and distinct from each individual. Such pronouncement of the State Bar does not necessarily mean all of its members agree with that pronouncement, nor is it necessary for them to do so. Individual members are free to think and to express their own opinions. But it is the nature of a representative democratic organization that the elected representatives of the group speak and act for it in accordance with its organic laws.

The rules of the State Bar of Wisconsin are rules promulgated by this court. They form the framework of the organization and Rule 1, Sec. 2 provides:

"SECTION 2. *Purposes.* The purposes of the association shall be to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged."

The other rules deal with the conditions of membership, the officers, the board of directors and the executive committee. Democratic procedure is provided for membership meetings and for membership referendum. Rule 10 provides for grievance committees and procedures for the in- [fol. 30] vestigation of grievances, for the protection of the members of the Bar and for the protection of the public. The integrated Bar has no power to discipline or to disbar any member. That power has been reserved to and not delegated by this court. The procedure under sec. 256.28, stats., 29 W.S.A., p. 358, for filing complaints for discipline or disbarment in this court is unaffected by these rules. Rule 11 and Rule 7 provide an orderly and easy method by which proposals to amend or abrogate the Rules of the State Bar may be brought before this court for hearing on petition. Rule 9 provides the rules of professional conduct set forth from time to time in the canons of professional ethics of the American Bar Association, as supplemented or modified by pronouncement of this court, shall be the standard governing the practice of law in this state. Prior to the adoption of the rules this court has not expressly adopted such canons of professional ethics in toto.

The By-laws of the State Bar provide for the internal workings of the organization and by Rule 11, Sec. 2, may be

amended or abrogated by resolution adopted by a vote of ⅔ of the members of the Board of Governors or by the members of the association themselves through the referendum procedure. As a further protection to the minority a petition for review of any change in the By-laws made by the Board of Governors will be entertained by the court if signed by 25 or more active members.

Independently of the provisions in the Rules for invoking our supervisory jurisdiction, this court has inherent power to take remedial action, on a sufficient showing that the activities or policies of the State Bar are not in harmony with the objectives for which integration was ordered or are otherwise contrary to the public interest.

Some suggestions made at the hearing related to changes in the By-laws and in the Rules. Some of these seem to have merit but this court believes that all of these suggestions should first be considered by the State Bar and we refer all such suggestions to the Board of Governors for consideration and action.

We wish to point out that the suggestion to amend Sec. 10 of Rule 10 to give the Board of Governors the power to change the grievance procedure for Milwaukee County and adopt the Milwaukee Bar Association's procedure to carry out the powers and duties of District 4 Grievance Committee might destroy the uniformity of the grievance procedure throughout the state, and in addition apply a procedure to members of the State Bar who are not members of the Milwaukee Bar Association. On the present state of the record we assume a uniform grievance procedure throughout the state will best serve the pubnc interest and the members of the State Bar.

It has been urged upon the court that no poll of the members of the State Bar has been taken by the Board of Governors to ascertain their desires concerning the continuation of the integrated Bar. The usefulness of such a poll was discussed in our opinion *In re Integration of Bar* (1946), 249 Wis. 523, 25 N.W. (2d) 500. Such poll, of course, would be informative but would not be determinative. Responsibility for creating and continuing the integrated State Bar of Wisconsin belongs to the court and its con-

tinuation must always rest in the judgment of the court. The Rules provide the means through referendum by which the members can secure a poll on any question of policy if sufficient members are dissatisfied with the action of the Board of Governors. This court does not intend to interfere with the orderly workings of the State Bar unless cause is shown.

One new objection was made, not so much to the continuance of the State Bar as to the limiting of its functions. It was argued the Rules of the State Bar should be restricted to pertain only to the discipline of individual members of the Bar for professional misconduct in cases duly before this court for determination. The Rules proposed in 1946 and rejected by this court indicated no general statement of purpose and no specification of activities excepting those having to do with complaints and grievances. As stated in that opinion, such Rules would merely implement without supplementing the work of the State Bar Commissioner. The power of the court is not restricted in matters of discipline to misconduct connected only with cases pending in this court. The disciplinary power of the court extends to the entire field of the practice of the law by members who have been admitted to practice by this court. When a member of the Bar is suspended or disbarred it is from the practice of the law, not only from appearing in court.

In the opinion *In re Integration of Bar* (1946), 249 Wis. 523, 25 N.W. (2d) 500, the court assumed it would be required to censor the budget and activities of the Bar after integration. Certain activities were pointed out for which the integrated Bar could not use its dues. The two years' experience with the Integrated Bar in this state has proven and we now believe that such detailed supervision is not desirable or essential to the existence of the integrated Bar. This court thought by the adoption of the present State Bar Rules and By-laws many of the statements made in the decision of 1946 were implicitly rejected. To clarify the point, the language of our previous opinions contrary or inconsistent with the present State Bar Rules and By-laws

promulgated by this court and this opinion is overruled. The integrated State Bar of Wisconsin is independent and free to conduct its activities within the framework of such Rules and By-laws. Within their confines this court expects the Bar to act freely and independently on all matters which promote the purposes for which the Bar was integrated subject to the general supervisory power of the Court. These Rules and By-laws constitute a democratic process by which members of the Bar can govern themselves and can act in unison and by which minorities are protected; and they provide appropriate procedures for invoking the supervisory power of this court.

It is ordered that the State Bar of Wisconsin be and it hereby is continued.

Dated December 22, 1958.

[fol. 31] [File endorsement omitted]

EXHIBIT B TO COMPLAINT

March 6, 1959

Mr. Joseph D. Donohue
State Bar of Wisconsin
402 West Wilson Street
Madison 3, Wisconsin

Dear Mr. Donohue:

I have received in an envelope postmarked February 27, 1959, a "second notice" to pay "1959 Membership Dues in State Bar of Wisconsin".

Section 2 of Article I of the State Bar of Wisconsin By-laws, promulgated by the Supreme Court of the State of Wisconsin provides that dues shall be paid to the Treasurer of the State Bar of Wisconsin, an organization created by said court, and that said dues shall be $15 per annum. I understand that you are the Treasurer of said State Bar of Wisconsin.

Section 3 of said Article I of said State Bar of Wisconsin By-laws provides that the Board of Governors *shall* suspend the membership of each dues delinquent member and " . . . that no person whose membership is suspended for the non-payment of dues shall be entitled to practice law during the period of such suspension."

In order that I may continue to engage in the livelihood for which I have been trained, and in which I have been engaged for more than eleven years, according to the order of the Supreme Court of Wisconsin I must send to you the dues commanded.

I therefore enclose herewith my certified check dated March 6, 1959 in the amount of $15.00 drawn on Madison Bank & Trust Company payable to the order of Joseph D. Donohue, which is sent to you *under protest.*

I do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities. I believe that when such coercion is by the judiciary it is extremely distasteful and alarming. A major portion of the activities of the State Bar as pre- [fol. 32] scribed by the Supreme Court of Wisconsin are of a political and propaganda nature. See, for example, sections 4, 5, 6, 7, 8, 9, 10 and 12 of Article IV of the above mentioned By-laws, and section 2 of Rule I of the State Bar of Wisconsin Rules.

You are placed on notice, therefore, that I will hold you personally liable for the amount of this payment. In my opinion this payment has been exacted in violation of both the Wisconsin and United States Constitutions.

Very truly yours,

Trayton L. Lathrop /s/

TLL:rv
Enclosure

[fol. 34] [File endorsement omitted]

IN THE CIRCUIT COURT OF DANE COUNTY

[Title omitted]

DEMURRER—Filed July 9, 1959

The defendant demurs to the complaint herein on the grounds that it appears on the face thereof that:

1. The court lacks jurisdiction over the subject matter of the action in that exclusive jurisdiction thereof is vested in the Supreme Court of the State of Wisconsin.

2. There is a defect of parties defendant in that the State Bar of Wisconsin is a necessary party.

3. The complaint does not state facts sufficient to constitute a cause of action.

Joseph D. Donohue, Defendant in propria persona.

Of Counsel: Gordon Sinykin, 110 East Main St., Madison 3, Wisconsin.

[fol. 39] [File endorsement omitted]

IN THE CIRCUIT COURT OF FOND DU LAC COUNTY

TRAYTON L. LATHROP, Plaintiff,

vs.

JOSEPH D. DONOHUE, Defendant.

DECISION OF THE COURT ON DEMURRER—October 9, 1959

Briefly, the complaint of the plaintiff alleges that he is duly licensed by the State of Wisconsin to practice law as a lawyer and that he has been so engaged since 1948. That on March 6, 1959, he paid to the defendant, by certified check payable to the order of the defendant, the sum of $15.00; and that at the time of the delivery of the check he

informed the defendant, in a letter which accompanied the check, that the check was sent under compulsion of Sections 2 and 3 of Article 1 of the By-laws of the State Bar of Wisconsin, and under protest, and that he would hold the defendant personally liable for that amount. A copy of the letter is attached to the complaint. That the defendant cashed the check and commingled the $15.00 with the funds of the State Bar of Wisconsin, the defendant being at that time Treasurer of the State Bar of Wisconsin. That the sum of $15.00 constituted dues which the plaintiff was required to pay to the State Bar of Wisconsin annually in order to be permitted to practice law, and that said payment was made under coercion and against his free will.

The complaint further alleges that the State Bar of Wisconsin has used its employees, property and funds in active unsolicited opposition to the adoption of legislation by the Legislature of Wisconsin which was favored by the plaintiff.

The complaint further alleges that the State Bar of Wisconsin has also been engaged in the promotion of matters contrary to its fundamental purposes. The last paragraph of the complaint reads as follows:

> [fol. 40] "The plaintiff bases this action on his claim that the defendant has unjustly received, held, and disposed of funds of the plaintiff in the amount of $15.00, which to the knowledge of the defendant were paid to the defendant by the plaintiff unwillingly and under coercion, and that such coercion was and is entailed in the rules and by-laws of the State Bar of Wisconsin continued in effect by the aforesaid order of the Supreme Court of Wisconsin dated December 22, 1958; and the said order, insofar as it coerces the plaintiff to support the State Bar of Wisconsin, is unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States, and Sections 1, 3, 4, 18 and 22 of Article 1 of the Constitution of the State of Wisconsin."

The addendum clause then prays for judgment against the defendant in the amount of $15.00, plus interest from

March 31, 1959, together with his costs and disbursements; and that the plaintiff have such other relief as may be just.

The defendant demurs to the complaint on the grounds that it appears on the face thereof that:

1. The Court lacks jurisdiction over the subject matter of the action in that exclusive jurisdiction thereof is vested in the Supreme Court of the State of Wisconsin.

2. There is a defect of parties defendant in that the State Bar of Wisconsin is a necessary party.

3. The complaint does not state facts sufficient to constitute a cause of action.

It is not clear from the complaint as to whether the plaintiff is basing his claim for the refund of the $15.00 dues paid to the State Bar of Wisconsin by virtue of the fact that he alleges that said payment was made under coercion as a result of his contention that the State Bar was engaged in activities contrary to the rules of the Supreme Court, or whether it is limited to a rule which provides that a lawyer must pay annual dues of $15.00 in order to be properly licensed to practice law in the State of Wisconsin. For the purpose of ruling on the demurrer, the complaint must be liberally construed; and for that reason the Court is con- [fol. 41] struing the complaint to mean that the plaintiff seeks a refund of the sum of $15.00 he paid as dues under a contention that he was coerced into paying said dues by the State Bar of Wisconsin while the State Bar of Wisconsin was engaged in the performance of functions contrary to the rules and regulations as promulgated by the Supreme Court of Wisconsin; and that he was likewise coerced into paying the $15.00 dues by virtue of a rule promulgated by the Supreme Court of Wisconsin which provides that, in order to practice law in the State of Wisconsin, annual dues in the sum of $15.00 must be paid to the State Bar of Wisconsin; and that as a result the rules so promulgated by the Supreme Court of Wisconsin in "In re: Integration of Bar, 273 Wis. 281," and State Bar rules and State Bar by-laws set forth in 273 Wis. xi through xxxvii, or certain of the provisions therein, are null and void as being in violation of constitutional provisions of either the State of Wisconsin or the United States of America. (The Supreme

Court of Wisconsin in "In re: Integration of Bar, 5 Wis. (2d) 618," on Dec. 22, 1958, ordered as follows: "It is ordered that the State Bar of Wisconsin be and it is hereby continued." By ordering the continuation of the State Bar of Wisconsin, the Supreme Court ordered that the State Bar rules and the State Bar by-laws (supra) be continued in effect indefinitely.)

Section 256.31 of the Statutes was adopted by the Legislature in the year 1943, being known as Chapter 315 of the Laws of 1943, and reads as follows:

> "State bar of Wisconsin. (1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.
>
> (2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that such [fol. 42] association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

In Integration of Bar Case: In re Constitutionality of Chapter 315, Laws of 1943, 244 Wis. 8, the Court held as follows:

> "Ch. 315, Laws of 1943, creating sec. 256.31, Stats., directing the supreme court to provide by appropriate orders for the organization and government of a state bar association, and providing that all persons licensed to practice law shall be members as a condition precedent to the right to practice law in this state, is not unconstitutional as delegating legislative power to the court, nor as denying to members of the bar the equal protection of the laws guaranteed by the Fourteenth amendment, nor as denying to them the benefit of federal statutes relating to the practice of law in the federal courts.

The integration of the bar is a judicial and not a legislative function, and the power to integrate the bar resides in the judicial and not in the legislative branch of the state government. The supreme court is not precluded from exercising the power of integrating the bar by the provision in sec. 3, art. VII, Const., conferring only appellate jurisdiction on that court.

So far as the integration of the bar involves matters affecting the general welfare, the legislature in the exercise of its powers may act subject to review by the court to determine whether the administration of justice is embarrassed or the constitutional power of the court is invaded.

The court will not treat ch. 315, Laws of 1943, as merely a memorial invoking the power of the court to integrate the bar, nor will the court regard the act as an attempt by the legislature to invade the province of the court or to dictate to it, but the court will regard the act as a legislative declaration that the integration of the bar will promote the general welfare.

In view of the fact that so many members of the bar are in the military and naval service or otherwise engaged in promoting the war effort, the matter of integration will not be proceeded with at the present time."

In In re Integration of the Bar, 249 Wis. 523, the Court held as follows:

"The justification for integrating the bar and compelling the payment of fees, which are the lifeblood of an integrated bar, would be that the supreme court has inherent power to control and regulate its bar as officers of the court, and that this power may be implemented by dues from the members of the bar which serve in a measure the function of license fees, but which are not such in a legal sense, in that they are not paid into the treasury of the state.

[fol. 43] "In case of integration of the bar by the supreme court pursuant to ch. 315 Laws of 1943, sec. 256.31, Stats., annual fees required of the members of the bar in support of the integrated bar would be moneys required to be paid into the treasury of the bar

for a public purpose connected with the administration of justice."

On Page 527 the Court said:

"In the original opinion we expressly reserved the question whether this court could require members of the bar to pay dues in support of an integrated bar. A consideration of this question is necessarily inseparable from a consideration of the question whether the court should integrate the bar, because the fees are the life-blood of the integrated bar, and to integrate the bar without fees would be useless. Such cases as we have examined, passing upon this point, hold that the court may require payment of dues. A. C. Brydonjack v. State Bar of California, 208 Cal. 439, 281 Pac. 1018, 66 A.L.R. 1507; In re Gibson, 35 N.M. 550, 4 Pac. (2d) 643; State Bar of Oklahoma v. McGhee, 148 Okla. 219, 298 Pac. 580; Kelley v. State Bar of Oklahoma, 148 Okla. 282, 298 Pac. 623; Petition for Integration of Bar of Minnesota, 216 Minn. 195, 12 N.W. (2d) 515; In re Scott, 53 Nev. 24, 292 Pac. 291. All of them very briefly justify the fees as an occupational license. This analogy cannot be pressed too far, although it has some vitality, because the license of occupations is clearly a legislative function. Further than this, license money should properly go into the treasury of the state and be appropriated. It must be appropriated for a public purpose, it requires a strict limiting of purposes of the integrated bar, and it raises embarrassing problems of auditing.

The justification for integrating the bar and compelling payment of fees is not that suggested by the cases above cited. It is rather that the court has inherent power to control and regulate its bar as officers of the court, and that this power may be implemented by dues from the members which serve in a measure the function of license fees, but which are not such in a legal sense. In other words, the court by reason of its inherent or implied powers may, if it thinks the exigencies call for it, require the bar to act as a unit,

to promote high standards of practice and the economical and speedy enforcement of legal rights, and to implement this may require the bar to make such contributions in money to the joint effort as is deemed necessary and proper. No matter what these fees be called, they are moneys required to be paid into the treasury of the bar for a public purpose connected with the administration of justice."

In In Re Integration of the Bar, 273 Wis. 281, on Page 283 the Court held as follows:

"This is the third time that this matter has received the attention of this court. See Integration of Bar Case, 244 Wis. 8, 11 N.W. (2d) 604, 12 N.W. (2d) 699, and In re Integration of Bar, 249 Wis. 523, 25 N.W. [fol. 44] (2d) 500. In those decisions legal and constitutional questions involving the enactment of ch. 315, Laws of 1943, now sec. 256.31, Stats., were considered and answered. It was held that said statutory provision is not binding upon the court but was an expression of public policy by the legislature. It was held that this court, by reason of its inherent powers, may require the bar to act as a unit to promote high standards of practice and the economical and speedy enforcement of legal rights.

In the first decision it was held that the bar should not be integrated while so many attorneys were engaged in the war effort. In the second decision it was intimated that the objectives sought to be obtained by integration could be attained by an adequately supported voluntary association, and the court advocated complete and wholehearted support of the voluntary association by the individual members of the bar. Many individual members of the bar did respond to that suggestion, but it is now reported that too many lawyers have refrained or refused to join, that membership in the voluntary association has become static, and that a substantial minority of the lawyers in the state are not associated with the State Bar Association.

Able attorneys presented arguments both for and against the granting of the petition. Apparently the

same arguments have been made in other states. 114 A.L.R. 151; 151 A.L.R. 586; and Petition of Florida State Bar Asso. 40 So. (2d) 902. It is unnecessary to repeat the arguments here.

Twenty-four states now have integrated bars. Some have been integrated in response to legislation such as we have in this state and some under the inherent power of the high courts of the various states."

The Supreme Court then ordered the State Bar of Wisconsin to be integrated when proper rules and procedures had been adopted by further order of the Court. It was as a result of this order that the Supreme Court promulgated the State Bar Rules and the State Bar By-laws (supra), the Court having ordered that these rules and by-laws be in effect for a period of two years.

In In Re Integration of the Bar, December 22, 1958, 5 Wis. (2d) 618, the Court said, at Page 620:

"The history of integration is adequately set forth in the previous decisions of this court. Integration of Bar Case (1943), 244 Wis. 8, 11 N.W. (2d) 604; In re Integration of Bar (1946), 249 Wis. 523, 25 N.W. (2d) 500; In re Integration of Bar (1956), 273 Wis. 281, 77 N.W. (2d) 602. The present rules and by-laws of the [fol. 45] State Bar of Wisconsin were adopted and promulgated and the bar integrated by order of this court on December 7, 1956, to be effective for two years commencing January 1, 1957, subject to amendment as provided in the rules and by-laws or at any time by order of this court. See Integration of the Bar (1956) 273 Wis. p. vii. (Order, Opinion, State Bar Rules, and State Bar By-laws)."

The Court further said, on Pages 622-623:

"We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice. Members of the legal profession by their admission to the bar become an important part of that process and this rela-

tionship is characterized by the statement that members of the bar are officers of the court. An independent, active, and intelligent bar is necessary to the efficient administration of justice by the courts. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the bar. The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this court should continue to exercise its supervisory control of the practice of the law.

The integration of the bar is no more undemocratic than the requirement of learning and good moral character of all who seek the privilege of practicing law. All members had the same opportunity and have freely chosen a profession subject traditionally to discipline and control by the courts. It is not undemocratic to require those who are privileged to practice law and are intrusted with the duty to secure or protect the property, rights, and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group, and to increase the effectiveness of their service to the public. The integrated bar has been defined as 'the process by which every member of the bar is given an opportunity to do his share in carrying out the public service of the bar and obliged to bear his portion of the responsibility.' Most objections have centered around the obligation to bear a portion of the responsibility. In the nature of things every privilege has a correlative obligation.

The integrated bar does not destroy either the independence of the bar or of the individual lawyers. The State Bar of Wisconsin was not intended to control and there is no evidence or intimation that it has controlled or attempted to control the thinking of any of its members. When the State Bar of Wisconsin through its board of governors, an elected representative policy-making body, duly decides a policy within its province on behalf of the State Bar everyone understands or

should understand the policy is that of the State Bar as an entity separate and distinct from each individual. [fol. 46] Such pronouncement of the State Bar does not necessarily mean all of its members agree with that pronouncement, nor is it necessary for them to do so. Individual members are free to think and to express their own opinions. But it is the nature of a representative democratic organization that the elected representatives of the group speak and act for it in accordance with its organic laws.

The rules of the State Bar of Wisconsin are rules promulgated by this court."

The Court further said, on Pages 624-625:

"The other rules deal with the conditions of membership, the officers, the board of directors, and the executive committee. Democratic procedure is provided for membership meetings and for membership referendum. Rule 10 provides for grievance committees and procedures for the investigation of grievances, for the protection of the members of the bar, and for the protection of the public. The integrated bar has no power to discipline or to disbar any member. That power has been reserved to and not delegated by this court. The procedure under sec. 256.28, Stats., for filing complaints for discipline or disbarment in this court is unaffected by these rules. Rule 11 and Rule 7 provide an orderly and easy method by which proposals to amend or abrogate the rules of the State Bar may be brought before this court for hearing on petition. Rule 9 provides the rules of professional conduct set forth from time to time in the canons of professional ethics of the American Bar Association, as supplemented or modified by pronouncement of this court, shall be the standard governing the practice of law in this state. Prior to the adoption of the rules this court had not expressly adopted such Canons of Professional Ethics in toto.

The by-laws of the State Bar provide for the internal workings of the organization and by Rule 11, sec. 2, may be amended or abrogated by resolution

adopted by a vote of two thirds of the members of the board of governors or by the members of the association themselves through the referendum procedure. As a further protection to the minority a petition for review of any change in the by-laws made by the board of governors will be entertained by the court if signed by 25 or more active members.

Independently of the provisions in the rules for invoking our supervisory jurisdiction, this court has inherent power to take remedial action, on a sufficient showing that the activities or policies of the State Bar are not in harmony with the objectives for which integration was ordered or are otherwise contrary to the public interest."

A rule promulgated by the Supreme Court of Wisconsin is as effective as a law passed by the Legislature, and in [fol. 47] effect is a law of the State. The Supreme Court has exclusive supervisory jurisdiction of the State Bar of Wisconsin. If the rules as now promulgated are such that they permit the State Bar of Wisconsin to engage in activities which are not in agreement with the views of the plaintiff, the plaintiff may seek a remedy by following the remedial provisions as contained in the rules, and the Supreme Court of Wisconsin has exclusive jurisdiction to determine whether or not the State Bar of Wisconsin is violating the rules or whether the rules should be amended. The Circuit Court has no jurisdiction to determine these questions.

Section 5 of Rule 2 of the State Bar Rules provides that every active member shall pay membership dues in such amount, not exceeding $20.00 per year, as may be fixed in the By-laws. Section 3 of the State Bar By-laws provides that a member shall be suspended for non-payment of dues. It also provides that no person whose membership is suspended for the non-payment of dues shall be entitled to practice law during the period of such suspension. By rule of the Supreme Court of Wisconsin it is the declared law of this State that in the event a lawyer fails to pay the dues as provided by law, he may be suspended and, as a result of being suspended, is not permitted to practice law

in this State. The rules further provide for a method of petitioning the Supreme Court of Wisconsin requesting that the rule be changed. The Circuit Court has no jurisdiction with reference to the rules herein involved. The plaintiff contends that the Circuit Court has jurisdiction by virtue of the fact that this is a suit for the collection of money. However, the subject matter of this litigation involves rules promulgated by the Supreme Court of Wisconsin, and the Supreme Court has exclusive jurisdiction with reference to the questions involved.

[fol. 48] It is therefore the considered opinion of this Court that the Supreme Court of Wisconsin has exclusive jurisdiction of the subject matter contained in the complaint of the plaintiff.

Assuming that this Court did have jurisdiction of the subject matter of the complaint, then is there a defect of parties defendant in that the State Bar of Wisconsin is a necessary party? The defendant Donohue is a practicing attorney and, at the time of the service of the complaint on June 8, 1959, was treasurer of the State Bar of Wisconsin. This Court takes judicial note of the rules of the State Bar of Wisconsin which provide for the election of officers and, by virtue of these rules, recognizes that the defendant is no longer treasurer of the State Bar. The Court also takes judicial note of the rules which provide that all funds must be disbursed in accordance with the orders of the Board of Governors of the Bar. The complaint recognizes that the sum of $15.00 paid to the defendant was turned over and went into the treasury of the State Bar and that the real owner of the funds is the State Bar. Rule 1 of the State Bar Rules provides:

> "The State Bar may, for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and dispose of real and personal property."

If the plaintiff can recover from the defendant on the ground that the State Bar Rules are invalid, as alleged, then the rights of the State Bar and its various assistants are in jeopardy in a lawsuit to which it is not a party. An indispensable party to a lawsuit can be defined as follows:

> "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

Silver King Coalition Mines Co. v. Silver King C.M. Co., 204 Fed. 166, quoted with approval in McCoy v. May, 255 Wis. 20.

[fol. 49] It is the opinion of this Court that the State Bar of Wisconsin is an indispensable party to this litigation and that its interest in the subject matter of the controversy is such that it should be required, for its own protection, to be brought in as a party defendant. (Section 260.19 (1) Wisconsin Statutes.)

Assuming that this Court did have jurisdiction of the subject matter of the complaint, then does the complaint state facts sufficient to constitute a cause of action? It is the contention of the plaintiff that the rules under which the State Bar operates, and particularly the rule requiring a lawyer to pay annual dues of $15.00, violate the provisions of the Constitution of Wisconsin and also the provisions of the Constitution of the United States.

Independently of the rules which create and govern the State Bar, the Supreme Court has exclusive supervisory jurisdiction over the State Bar by virtue of its inherent power to take remedial action on a sufficient showing that the activities or policies of the State Bar are not in harmony with the objectives for which integration was ordered, or are otherwise contrary to the public interest. The Circuit Court has no such jurisdiction.

The power and authority to grant a permit to an individual, authorizing the individual to practice law, rests exclusively in the Supreme Court. The power to control the activities of the lawyers and supervise, reprimand, suspend or disbar a lawyer likewise rests exclusively in the Supreme Court. The Supreme Court, in creating the Integrated Bar (State Bar of Wisconsin), did not relinquish those rights or powers. The Supreme Court also retained

the right and power to supervise, regulate and control the Integrated Bar (State Bar of Wisconsin).

If, when a person is granted permission to practice law, he gets that permission as a matter of right, then a serious [fol. 50] question would arise as to whether he could be required to pay annual dues in order to be in good standing. It is the considered judgment of this Court that no individual can demand a permit to practice law as a matter of right. In securing permission to practice law, an individual secures the permission by virtue of a privilege. A privilege is not a right. If it is a requirement that the individual pay annual dues in order that the individual may continue to exercise the privilege of practicing law, he is not being deprived of any right under either the Constitution of the State of Wisconsin or under the Constitution of the United States.

The Supreme Court has dealt with the question of the Integrated Bar on at least four occasions (decisions supra), not only by its decisions but by its acts in ordering the integration of the Bar. (In so doing, creating the State Bar of Wisconsin.) Under the rules of the Supreme Court it has effectually declared that all of its rules and regulations are of such a nature that they do not violate any of the provisions of either the Constitution of the State of Wisconsin or of the Constitution of the United States.

This Court concludes that the rules and regulations of the State Bar of Wisconsin, which have been promulgated by the Supreme Court of Wisconsin, do not violate any of the provisions of the Constitution of the State of Wisconsin or of the Constitution of the United States.

It is unnecessary to treat with the question of whether or not the payment by the plaintiff is to be considered as a payment under protest, or a voluntary payment.

Due consideration has also been given to various other contentions raised by the respective parties, and it is considered that it is unnecessary to discuss them in order to reach a decision.

[fol. 51] In 5 Wis. (2d), 618 (December 22, 1958) the Court said:

> "* * * It is not undemocratic to require those who are privileged to practice law and are intrusted with

> the duty to secure or protect the property, rights, and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group, and to increase the effectiveness of their service to the public. The integrated bar has been defined as 'the process by which every member of the bar is given an opportunity to do his share in carrying out the public service of the bar and obliged to bear his portion of the responsibility.' * * * ."

It is therefore concluded that the complaint fails to state facts sufficient to constitute a cause of action.

Assuming that this Court did have jurisdiction over the subject matter of the complaint, and assuming that the State Bar of Wisconsin was made an additional party defendant, it would then be the considered judgment of this Court that it would be impossible to frame a complaint so as to state facts sufficient to constitute a cause of action against either the State Bar of Wisconsin or the defendant Donohue (in the Circuit Court).

In Pedrick v. First National Bank of Ripon, 267 Wis. 436, it is held:

> "Where it appears that a sufficient complaint cannot be framed, the trial court, on sustaining a demurrer, may in its discretion deny to the plaintiff the opportunity to plead over."

It follows that the demurrer of the defendant must be sustained; and that the Court should exercise its discretion and deny to the plaintiff the right to plead over.

Counsel for the defendant is hereby directed to prepare for the Court's signature an order sustaining the demurrer of the defendant, dismissing the complaint of the plaintiff, and denying the plaintiff the right to plead over. The order shall further provide that the defendant recover from the plaintiff the sum of $15.00 costs.

Dated: October 9, 1959.

By the Court, Russell E. Hanson, Circuit Judge.

[fol. 54] [File endorsement omitted]

IN THE CIRCUIT COURT OF FOND DU LAC COUNTY

TRAYTON L. LATHROP, Plaintiff,

vs.

JOSEPH D. DONOHUE, Defendant.

JUDGMENT OF DISMISSAL—October 23, 1959

At a term of the Circuit Court for Fond du Lac County, Wisconsin, held at the Court House in the City of Fond du Lac, in said county, present the Honorable Russell E. Hanson, Circuit Judge, presiding.

This action having come on for hearing before the Court on September 3, 1959 upon the demurrer of the defendant to the complaint of the plaintiff herein; and the Court having on October 9, 1959 rendered its decision and written opinion upon said demurrer; and the Court having, by an order made and entered on October 23, 1959, sustained said demurrer, denied leave to the plaintiff to plead over, and directed judgment to be entered dismissing the plaintiff's complaint upon its merits with costs of Fifteen ($15.00) Dollars for the defendant;

Now, Therefore, upon motion of Gordon Sinykin, of counsel for the defendant,

It Is Ordered and Adjudged that the complaint of the plaintiff herein be and the same hereby is dismissed upon its [fol. 55] merits, and that the defendant, Joseph D. Donohue, have and recover from the plaintiff, Trayton L. Lathrop, costs in the sum of Fifteen ($15.00) Dollars.

Dated this 23 day of October, 1959.

By the Court:

George E. McConahey, Clerk.

[fol. 56] [File endorsement omitted]

IN THE CIRCUIT COURT OF FOND DU LAC COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed November 25, 1959

To: Joseph D. Donohue, defendant. Gordon Sinykin, of counsel for the defendant.. Clerk of Circuit Court for Fond du Lac County, Wisconsin.

Please Take Notice that Trayton L. Lathrop, the plaintiff in this action, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this action in the Circuit Court for the County of Fond du Lac on the 23rd day of October, 1959, in favor of the defendant and against the plaintiff and from the whole of said judgment. The aforesaid plaintiff does further appeal to the Supreme Court of the State of Wisconsin from the order sustaining demurrer entered in this action in the aforesaid circuit court on the 23rd day of October, 1959, and from the whole of said order.

Dated this 19th day of November, 1959.

Trayton L. Lathrop, Plaintiff, Leon E. Isaksen, of counsel for the plaintiff.

[fol. 58]

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

FOND DU LAC CIRCUIT COURT.

Opinion by Justice Currie.

TRAYTON L. LATHROP, Appellant,

v.

JOSEPH D. DONOHUE, Respondent.

JUDGMENT—April 5, 1960

This cause came on to be heard on appeal from the judgment of the Circuit Court of Fond du Lac County and

was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of this Court of December 7, 1956, which promulgated the rules and by-laws of the State Bar of Wisconsin effective for a two year period, and the further order of this Court of December 22, 1958, which continued the State Bar of Wisconsin on a permanent basis, do not violate the Fourteenth amendment to the United States constitution and are constitutional. The Judgment of the Circuit Court of Fond du Lac County, appealed from in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of One Hundred Twenty-five Dollars and No Cents ($125.00).

Justice Hallows took no part.

[fol. 59] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

TRAYTON L. LATHROP, Appellant,

v.

JOSEPH D. DONOHUE, Respondent.

OPINION—Filed April 5, 1960

Appeal from a judgment of the circuit court for Fond du Lac county: Russell E. Hanson, Circuit Judge. *Affirmed.*

Action commenced June 8, 1959, by Trayton L. Lathrop to recover the sum of $15 paid by him to the defendant Joseph D. Donohue under an alleged unconstitutional compulsion.

The material allegations of the complaint are as follows: The plaintiff was admitted to practice of law by the supreme court of Wisconsin in 1948 and since his admission he has practiced his profession at the city of Madison. The defendant is the treasurer of the State Bar of Wisconsin (hereinafter referred to as the "State Bar") which was integrated on a trial basis in 1956, by order of the supreme court of Wisconsin, and functions under the rules and by-laws of

such organization approved by further order of the same [fol. 60] court. This integration of the bar was continued in effect on a permanent basis by further order of such court entered December 22, 1958. Such rules and by-laws impose compulsory membership and the payment of annual dues upon all persons admitted to practice law and engaged in the active practice of law in the state as a requisite of such persons continuing in such active practice. On or about March 6, 1959, the plaintiff paid under protest to the defendant the sum of $15 to cover his annual dues to the State Bar for the calendar year 1959, and accompanied such payment with a letter which stated that such payment was made under compulsion of the by-laws of such organization requiring such payment, and that the plaintiff would hold the defendant personally liable for the amount so paid. The supreme court's order of December 22, 1958, insofar as it coerces the plaintiff to support the State Bar, is alleged to be unconstitutional on the ground that it violates the Fourteenth amendment of the United States constitution and art. I of the Wisconsin constitution.

The defendant demurred to the complaint on the following three grounds:

> "1. The court lacks jurisdiction over the subject matter of the action in that exclusive jurisdiction thereof is vested in the Supreme Court of the State of Wisconsin.
>
> "2. There is a defect of parties defendant in that the State Bar of Wisconsin is a necessary party.
>
> "3. The complaint does not state facts sufficient to constitute a cause of action."

The trial court filed a memorandum decision in which the facts and the legal authorities were carefully and comprehensively considered, and determined that the demurrer must be sustained on all three grounds. An order sustain- [fol. 61] ing the demurrer was accordingly entered. Under date of October 23, 1959, judgment was rendered dismissing the complaint upon its merits. From such judgment the plaintiff has appealed.

[fol. 62] CURRIE, *J.* This court has determined to consider the constitutional issue raised on its merits and not to dispose of the appeal upon procedural grounds.

While we are of the opinion that the learned trial court properly determined that the circuit court was without jurisdiction to pass upon the validity of an order of this court which regulates the practice of law, we will treat the action as though it had been originally and properly brought in this court. The reason for so doing is that this action is one *publici juris* in which we have had the benefit of most thorough and adequate briefs and oral argument upon the constitutional issue presented. Under such circumstances we deem it would work an injustice to dismiss the action and compel the plaintiff to commence a new proceeding in this court to relitigate the same issue.

The other procedural ground upon which the trial court sustained the demurrer to the complaint was that there was a defect of parties defendant. In so holding, the trial court determined that the State Bar is an indispensable party to this litigation under sec. 260.19 (1), Stats. However, we deem that there may be some merit to the plaintiff's contention that in order to rule that there is a defect in parties defendant it is necessary to decide the constitutional issue. This is because, if the orders of this court creating the State Bar an entity are void, then it has no standing which would require it to be made a party. We are satisfied that counsel for the defendant Donohue has so competently marshaled the facts and the law in support of the constitutionality of the orders creating the State Bar that its interests do not require that it be made a party. Both the trial court and [fol. 63] this court possess the power to have compelled, on the court's own motion, the impleading of it as a party defendant, if its interests were deemed to require that this be done, as an alternative to dismissal of the action because of failure of the plaintiff to have joined it as a party.

The plaintiff bottoms his contention, that the integration of the bar is unconstitutional, upon the thesis that such integration violates the First amendment freedoms of free speech, press, assembly, and petition which are inherent in the due-process and equal-protection-of-the-laws clauses of the Fourteenth amendment. He also claims that there is

a violation of these same freedoms as stated in various sections of art. I of the Wisconsin constitution. However, such provisions of the Wisconsin constitution are substantially the equivalent of the due-process and equal-protection-of-the-laws clauses of the Fourteenth amendment. *Boden* v. *Milwaukee* (1959), 8 Wis. (2d) 318, 324, 99 N. W. (2d) 156, and *Pauly* v. *Keebler* (1921), 175 Wis. 428, 185 N. W. (2d) 554. We are satisfied that if the orders creating and continuing the State Bar violate the provisions of art. I of the state constitution they also violate the Fourteenth amendment. We will, therefore, confine our consideration of the constitutional issue to whether there exists a violation of the Fourteenth amendment.

In *Integration of Bar Case* (1943), 244 Wis. 8, 11 N. W. (2d) 604, the argument was advanced that the statute enacted by the legislature (ch. 315, Laws of 1943), which provided for this court integrating the bar, violated the Fourteenth amendment. Mr. Chief Justice Rosenberry in his opinion for the court dealt with such argument at pages 41 to 44 thereof. It was there determined that an integration of the bar would not violate the Fourteenth amendment.

[fol. 64] While we might ground our decision of the instant case on this sound precedent authored by one of the great chief justices of this court, we choose not to do so. This is because the plaintiff has advanced some arguments that were not presented to the court when it previously considered the constitutional issue in 1943.

The plaintiff commences his argument with the sound premise that the right of any person to belong to an association embodies certain First amendment freedoms protected by the Fourteenth amendment. As the United States supreme court recently declared in *Bates* v. *City of Little Rock* (1960), —— U. S. ——, 80 Sup. Ct. 412, 416, 4 L. Ed. (2d) 480, 485:

> "And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth amendment from invasion of the States. *De Jonge* v. *Oregon*, 299 U. S. 353, 364, 57 S. Ct. 255, 259, 81 L. Ed. 278; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 460, 78 S. Ct. 1163, 1170, 2 L. Ed. (2d) 1488."

This court held to the same effect in *Lawson* v. *Housing Authority* (1955), 270 Wis. 269, 274, 70 N. W. (2d) 605.

From this premise the plaintiff argues that the converse is also true, i.e., the right not to belong to an association is also a freedom protected by the Fourteenth amendment. In support thereof he cites the following statement from the opinion of the Maine court in *Pappas* v. *Stacey* (1955), 151 Me. 36, 116 Atl. (2d) 497, 500: "Freedom to associate of necessity means as well freedom not to associate. . . ."[1]

However, decisions of serious questions of constitutional law ought not to be grounded upon cliché.

The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or [fol. 65] vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year. He is as free as he was before to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar.

The right to practice law is not a right but is a privilege subject to regulation. *Petition for Integration of the Bar of Minnesota* (1943), 216 Minn. 195, 12 N. W. (2d) 515, 518. As the Arizona court well stated in *In re Greer* (1938), 52 Ariz. 385, 81 Pac. (2d) 96, 98:

> "The right to practice law is not a natural nor constitutional one, in the sense that the right to engage in the ordinary avocations of life, such as farming, the industrial trades and the mercantile business is. It has always been considered as a privilege only, bestowed upon certain persons primarily for the benefit of society, and upon such terms and conditions as the state may fix. The final determination as to what these conditions are, and who has satisfactorily complied therewith, is, and always has been, in the courts before

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[1] In making such statement the Maine court was not referring to rights protected by the Fourteenth amendment, but was interpreting a state statute which provided, "Workers shall have full freedom of association . . ."

which the individual practices his profession, and from time immemorial such individuals have been considered essentially and primarily as officers of the court admitting them."

The only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process. *Schware* v. *Board of Examiners* (1957), 353 U. S. 232, 77 Sup. Ct. 752, 1 L. Ed. (2d) 796.

Mr. Chief Justice Rosenberry declared in the *Integration of Bar Case* (1943), *supra*, that the dues payable by a lawyer to an integrated bar imposed by state action are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation. This is also the holding of the Florida and Louisiana courts in *Petition of Florida State Bar Association* (Fla. 1949), 40 So. (2d) 902, and *In re Mundy* (1942), 202 La. 41, 11 So. (2d) 41. The fact that a license fee exacted by the courts [fol. 66] is not deposited in the public treasury but is disbursed by the court created agency to which paid, does not militate against the validity of such license fee. *Laughlin* v. *Clephane* (D. C. for Dist. Col. 1947), 77 Fed. Supp. 103.

The plaintiff grounds his argument, that the compulsory dues of the State Bar do impinge upon First amendment freedoms, on the fact that the State Bar does take a stand on legislation pending before the legislature. He points out that he personally is opposed to some of the legislation supported by it. Because of this he contends his rights guaranteed by the First amendment are violated because part of his dues money is used to support causes to which he is opposed.

Whatever activity in the legislative field in which the State Bar does engage is limited by its rules and by-laws promulgated by this court. Two of the standing committees which the board of governors is directed to establish by Rule 4 are the Committee on Administration of Justice and the Committee on Legislation. Secs. 4 and 9 respectively of the by-laws define the duties of these two committees and read as follows:

"Section 4. *Committee on administration of justice.* This committee shall study the organization and opera-

tion of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.

"Section 9. *Committee on legislation.* This committee shall study all proposals submitted to the Wisconsin Legislature or the Congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals."

This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the legislative measures advocated or opposed have dealt with the administration [fol. 67] of justice, court reform, and legal practice. Neither the above-quoted by-laws nor the stated purposes set forth in Rule 2 for which the bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects. The plaintiff complains that certain proposed legislation, upon which the State Bar has taken a stand, embody changes in substantive law, and points to the recently enacted Family Code. Among other things, such measure made many changes in divorce procedure, and, therefore, legal practice. We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law.

We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more

effectively than can a voluntary bar association. Cf. *Petition of Florida State Bar Ass'n., supra.*

The plaintiff contends that the State Bar's legislative activities are the same as those of such voluntary bar associations as the former Wisconsin Bar Association and the American Bar Association. Such argument ignores the obvious and very material distinction that exists between the legislative activities of the State Bar and those of a [fol. 68] voluntary association. A voluntary association is free to take a stand on any proposed legislation in any field it deems desirable. This is not true of the State Bar which must confine its activities in legislative matters to those authorized by the rules and by-laws promulgated by this court. Insofar as it confines such activities to those authorized by the rules and by-laws, this court will not interfere or in any manner seek to control or censor the action taken, or to substitute its judgment for that of the membership of the State Bar. This was made crystal clear in our opinion in *In re Integration of the Bar* (1958), 5 Wis. (2d) 618, 625-627, 93 N. W. (2d) 601. Any other course would be abhorrent to our sense of devotion to the ideal of a free and independent bar. However, as we pointed out in our opinion in the 1958 *In re Integration of the Bar Case*, this court will exercise its inherent power to take remedial action should the State Bar engage in an activity not authorized by the rules and by-laws and not in keeping with the stated objectives for which it was created. If the lawyers of the state wish by group action to engage in legislative activities not so authorized they will have to do so within the framework of some voluntary association, and not the State Bar.

In the recent case of *Dulles* v. *Johnson* (2d Cir. 1959), 273 Fed. (2d) 362, the court had before it the question of whether bequests to certain New York bar associations were exempt from federal estate tax. While such associations were voluntary in character, their activities in legislative matters seem to have been similar in scope to those of the [fol. 69] State Bar of Wisconsin. The commissioner of internal revenue contended that the bequests were subject to tax because the associations were attempting to influence legislation and to carry on propaganda. However, the court ruled that the bequests were exempt and stated (p. 367):

"Moreover, the legislative recommendations of the Associations, insofar as these recommendations do not involve matters the responsibility for which has been entrusted to the Associations by the Legislature, are designed to improve court procedure or to clarify some technical matter of substantive law. They are not intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy. These two factors lead us to the conclusion that the recommendations of the Associations concerning impending legislation are not such as to cause the forfeiture of charitable status under Section 812 (d)."

In other words, the court of appeals for the Second Circuit determined that these restricted legislative activities were in the public interest and did not destroy the exemption.

While the police power is generally considered an exclusive power of the legislature, it may be exercised by courts. *Petition of Florida State Bar Ass'n., supra.* In such cited case the court held that its exercise of inherent power to integrate the Florida bar constituted an exercise of the police power. We deem that the same is true of the 1956 and 1958 orders of this court integrating the bar of this state, and continuing the same, in order to improve the administration of justice. In situations where regulatory measures adopted by the states, or agencies thereof, pursuant to the police power, are attacked as infringing First amendment freedoms, the courts are required to balance the competing public and private interests at stake. *Barenblatt* v. *United States* (1958), 360 U. S. 109, 126, 79 Sup. Ct. 1081, 3 L. Ed. (2d) 1115; *National Asso. for Advancement of Colored People* v. *Alabama* (1958), 357 U. S. 449, 463, 466, 78 Sup. Ct. 1163, 2 L. Ed. (2d) 1488; and *Schneider* v. *Irvington* (1939), 308 U. S. 147, 161, 60 Sup. Ct. 146, 84 L. Ed. 155.

[fol. 70] When we attempt to balance the competing interests at stake in this action we find no regulation of, or interference with, any of the plaintiff's rights of free speech, assembly, or petition. The only challenged interference with his liberty is the exaction of annual dues to the State Bar, in the nature of the imposition of an annual license

fee, not unreasonable or unduly burdensome in amount, part of which is used to advocate causes to which he is opposed. However, this court in which is vested the power of the state to regulate the practice of law, has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar. The public interest so promoted far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues.

Furthermore, the State Bar is a public and not a private agency. In the annotation entitled, "State bar created by act of legislature or rules of court; integrated bar," 114 A. L. R. 161, the author states:

> "While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies."

State Bar v. *Superior Court* (1929), 207 Cal. 323, 278 Pac. 432, 434, and *In re Gibson* (1931), 35 N. Mex. 540, 4 Pac. (2d) 643, 653, support the above-quoted statement.

In 1951 the Wisconsin legislature created the Judicial Council. Of the present sixteen members thereof, four are chosen by the State Bar as a result of a secret ballot of [fol. 71] its active members, three directly for such position and the fourth ex-officio because of having been elected president-elect of the organization. Such judicial council has been expressly authorized by the legislature to recommend to it "changes in the organization, jurisdiction, operation and methods of conducting the business of the courts." Sec. 251.181 (2)(f), Stats. Thus it advocates adoption of legislation of the same category on which the State Bar voices a position. The council's activities are financed by an appropriation of the legislature and thus is supported out of the state's tax revenues. We are satisfied that the plain-

tiff as a taxpayer could not successfully challenge the constitutionality of the disbursement of public funds derived from taxes to support the activities of the judicial council merely because he was opposed to certain proposed legislation which it recommended be passed by the legislature. We can perceive no valid basis for distinguishing that situation from the one here confronting us insofar as constitutionality is concerned. The State Bar is a public agency the same as the Judicial Council. One has been created by the court and the other by the legislature but each was created by state action as a state agency to serve a public purpose.

While the plaintiff does not challenge the constitutionality of the purposes, other than legislative, for which the State Bar expends the annual dues collected from its members, we deem it advisable to set forth in an appendix to this opinion an analysis of such activities and the public purpose served thereby. Such analysis is not based upon the allegations of the complaint but upon facts of which this court takes judicial notice.

A considerable portion of plaintiff's brief is devoted to an impassioned argument that the integration of the bar is but the initial step which will lead to fascist syndicalism of the type rampant in Italy during Mussolini's years of [fol. 72] power. As plaintiff points out, the chief evil of such a system was that the syndicates usurped and exercised the powers which in a democracy would be exercised by parliament and the courts, with resulting curtailment of the liberties of the people. That integration will lead to fascist syndicalism is an argument addressed to the policy making functions of the court, which would be material on the issue of whether or not to direct that the bar be integrated, but is hardly pertinent with respect to the issue of constitutionality. It is the constitutional issue alone with which we are here concerned.

Some of the states which have had long years of experience with an integrated bar, and the years in which such integration was accomplished are:

North Dakota	— 1921
California	— 1927
South Dakota	— 1931
Washington	— 1933
Missouri	— 1934

If bar integration were to lead to syndicalism one would think that some start in this direction at least would be discernible by now after the lapse of a period in excess of twenty-five years that these five states have had integrated bars. The fact that no such trend has occurred after such long experience with an integrated bar is to us convincing proof of the groundless nature of plaintiff's fears.

Mr. Justice Holmes, in his famous dissent in *Panhandle Oil Co.* v. *Knox* (1928), 277 U. S. 218, 223, 48 Sup. Ct. 451, 72 L. Ed. 857, after referring to Chief Justice Marshall's often quoted dictum that the power to tax is the power to destroy, declared, "The power to tax is not the power to destroy while this court sits." This prompts us to observe that any usurpation on the part of the State Bar of the powers of either the legislature or the courts will not occur so long as this court sits. Without such usurpation of leg- [fol. 73] islative or judicial power there can be no fascist syndicalism.

It is our considered judgment that the orders of this court integrating the bar, and continuing such integration, violate none of the First amendment freedoms of the plaintiff as embodied in the due-process and equal-protection-of-the-laws clauses of the Fourteenth amendment.

While we have considered and resolved the constitutional issue as if this were a proceeding originally brought in this court, our mandate also will affirm the judgment below.

By the Court.—The order of this court of December 7, 1956, which promulgated the rules and by-laws of the State Bar of Wisconsin effective for a two year period, and the further order of this court of December 22, 1958, which continued the State Bar of Wisconsin on a permanent basis, do not violate the Fourteenth amendment to the United States constitution and are constitutional. The judgment appealed from is affirmed.

[fol. 74] APPENDIX

Major Activities of State Bar of Wisconsin Post-Graduate Education of Lawyers.

The most extensive activities of the State Bar are those directed toward post-graduate education of lawyers. There is a great need for this because of the rapid changes and

new developments that have occurred in the field of law subsequent to the admission to practice of a large percentage of the lawyers of the state. This trend shows no signs of abating. In order that lawyers be qualified to properly represent clients such post-graduate education is essential.

The State Bar provides such post-graduate education through its annual and separate mid-winter meetings, its regional meetings, its annual tax school, and its publication of the Wisconsin Bar Bulletin. The annual and the mid-winter meetings of the State Bar are each of at least two days' duration and are largely devoted to the delivery of papers on technical legal subjects of an instructive nature. The same is true of the one day regional meetings annually held throughout the state. At the annual two-day tax school the papers delivered are confined to the fields of taxation. Many of these papers delivered at these various meetings are later published in the Wisconsin Bar Bulletin so that they will be available for instant reference by all members of the bar of the state. Each member of the State Bar receives a copy of the Wisconsin Bar Bulletin by mail as issued, it being published bi-monthly.

Post-graduate education of lawyers is in the public interest because it promotes the competency of lawyers to handle [fol. 75] the legal matters entrusted to them by those of the general public who employ them.

Public Relations.

The field of endeavor carried on under the name of "public relations" would better be termed "public service." The chief activity carried on in this field by the State Bar is the preparation, publication, and distribution to the general public of pamphlets dealing with various transactions and happenings with which laymen are frequently confronted, which embody legal problems. Alternative courses of action are sometimes set forth and the advantages and disadvantages of each explained. Where there is danger that a layman might be likely to overlook some positive requirement of the law, such requirements are pointed out. Among the titles of such pamphlets are: "It May be Your Turn Next—What to do in Case of an Auto Accident"; "Have You Made

a Will"; "Sound Steps in Purchasing a Home"; and "Joint Tenancy—Boon or Boomerang." Banks and trust companies, local bar associations, and others purchase these pamphlets from the State Bar at slight advance above the cost of publication in order to cover boxing and mailing expense. The statement of receipts and disbursements of the State Bar for the calendar year of 1959 shows receipts of $2,748.27 from the sale of pamphlets which receipts should be credited against a total expenditure for "Public Relations" of $2,743.55.

Another activity of the State Bar in this field consists of preparation of informative articles on legal subjects which are offered for publication to the newspapers throughout the state, and are published under the heading of "The Law and You."

[fol. 76] A further public relations activity is the preparation and distribution of news releases covering the activities of the State Bar, such, for example, as the observance throughout the state of "Law Day, U. S. A."

Discouraging Unauthorized Practice of the Law.

One of the standing committees of the State Bar is that of Unauthorized Practice of Law. The primary purpose of such committee is to protect the public from incompetent laymen attempting to offer or perform legal services which they are not competent to render. This is a constant program since numerous trades and occupations keep expanding their services and frequently start offering services which constitute the practice of the law. As a result of integration the income from dues has enabled the State Bar to employ an additional lawyer on its staff whose major assignment is to investigate complaints made with respect to instances of unauthorized practice of the law, and to cause any unauthorized practices so discovered to be discontinued through persuasion or legal action.

Establishment of a Minimum Fee Schedule.

The State Bar recently adopted a recommended minimum fee schedule covering legal services. The present economic plight of the lawyers in this country is one which has

disturbed the bench and the bar. Able young men who otherwise might be attracted to entering the legal profession are being discouraged not to because of this. Lawyers already in the profession because of insufficient incomes are caused to forsake the practice of law for more financially attractive fields of endeavor. According to statistics gathered by the Economics of Law Practice Committee of the American Bar Association during the period of 1929 to 1951 the net income of lawyers increased but 58 per cent, while for the same period that of dentists rose 83 per cent and that of physi- [fol. 77] cians 157 per cent. During the same period the net income of employees of all industry increased 131 per cent. During 1954 the net income before taxes of one-third of all practicing lawyers of the nation was less than $5,485.

The quality of legal service which will be rendered to the public is likely to suffer if young men of ability are dissuaded from entering the profession because of the difficulty of securing an adequate financial reward to enable them to properly support themselves and their families. A minimum fee schedule which realistically recommends charges for legal services that are in keeping with the increased cost of living that has taken place since World War II, should have a tendency toward remedying this condition. Such a schedule also serves a further public purpose because it provides a guide for the basing of legal charges that tends to prevent overcharges as well as undercharges. Lawyers, who are true to their oath of admission, recognize that adoption of a recommended minimum fee schedule does not relieve them from the duty of serving the poor without compensation, or of reducing the charge if the normal charge would be unduly burdensome to a client of limited means. Furthermore, a lawyer's charge for services, even when based upon the recommended schedule, is always subject to the courts' determination of reasonableness.

Legal Aid.

Another of the standing committees of the State Bar is the Legal Aid Committee. This committee has done effective and noteworthy work to encourage the local bar associations of the state to set up legal aid systems in their local com-

munities under which legal services are rendered without charge to the indigent in the need of the same. Such committee has also outlined recommended procedures for establishing and carrying through such systems of providing legal aid.

[fol. 78] *Investigation and Adjustment of Grievances.*

The State Bar has created grievance committees for each of the nine districts into which the state has been divided for election purposes. These districts coincide with the Congressional districts of the state except for combining the two Congressional districts of Milwaukee county into one district. While the supreme court has delegated none of its power to punish disciplinary infractions, these State Bar grievance committees perform a valuable function in investigating and adjusting grievances filed against lawyers of the district in which the particular grievance committee functions. Prior to integration of the bar most of such grievances were investigated by the paid counsel of the Board of State Bar Commissioners, and the cost thereof was defrayed from the general tax revenues of the state. Since integration most of such work of investigation of grievances has been done by the grievance committees of the State Bar. As a result there has been a saving to the general taxpayers of the state. One evidence of this is that the Board of State Bar Commissioners is requesting a decrease in its appropriation from the state of $800 less for the coming biennium than was appropriated in the present biennium.

Legislative Activities.

In addition to the legislative activities of the State Bar to which the plaintiff objected, and which are discussed in the opinion, the State Bar performs the further function of promptly publicizing to the lawyers of the state pending and adopted legislation affecting legal practice. Acts lengthy in scope, such as the Family Code and the Act Extending [fol. 79] the Jurisdiction of the Courts Over Non-Resident Persons and Corporations, are analyzed and explained by articles published in the Wisconsin Bar Bulletin. Such activities enable the lawyers to better serve their clients.

[fol. 80] [File endorsement omitted]

IN THE
SUPREME COURT OF THE STATE OF WISCONSIN
August Term 1959—Case No. 254

TRAYTON L. LATHROP, Appellant,

vs.

JOSEPH D. DONOHUE, Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 5, 1960

I. Notice is hereby given that Trayton L. Lathrop, the appellant above named, hereby appeals to the Supreme Court of the United States from the whole of the final judgment of the Supreme Court of the State of Wisconsin which (a) adjudicated that the order of said court of December 7, 1956, which promulgated the rules and by-laws of the State Bar of Wisconsin effective for a two year period, and the further order of said court of December 22, 1958, which continued the State Bar of Wisconsin on a permanent basis, do not violate the Fourteenth Amendment to the United States Constitution and are constitutional, and (b) affirmed the judgment of the Circuit Court for Fond du Lac County, Wisconsin, which latter judgment dismissed the appellant's complaint in this action upon its merits; said final judgment of the Supreme Court of the State of Wisconsin having been entered in this action on the 5th day of April, 1960.
[fol. 81] This appeal is taken pursuant to 28 U.S.C. section 1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following papers in this action:

(a) Certificate of Service of Summons and Complaint

(b) Summons

(c) Complaint

(d) Demand for Change of Venue

(e) Demurrer of Defendant

(f) Order to Show Cause and Affidavit in Support of Motion for Change of Venue

(g) Consent of Plaintiff to Change of Place of Trial dated July 15, 1959.

(h) Decision of the Circuit Court for Fond du Lac County on Demurrer dated October 9, 1959.

(i) Order of Circuit Court for Fond du Lac County sustaining Demurrer dated October 23, 1959.

(j) Judgment of Dismissal of Circuit Court for Fond du Lac County dated October 23, 1959.

(k) Notice of Appeal dated November 19, 1959.

(l) Decision and Judgment of the Supreme Court of the State of Wisconsin entered in this action on April 5, 1960.

(m) This Notice of Appeal to the Supreme Court of the United States.

III. The following question is presented by this appeal:

Do the orders and rules of the Supreme Court of [fol. 82] the State of Wisconsin referred to in paragraph I of this Notice of Appeal and the rules and by-laws which were promulgated thereby deprive the appellant, who is a native of the State of Wisconsin and a resident licensed practicing attorney in said state and has no income outside of that received from the practice of law, of his rights of freedom of association, assembly, speech, press, conscience and thought, or of his liberty or property without due process of law or deny to him equal protection of the law or

otherwise deprive him of rights under the Fourteenth Amendment of the Constitution of the United States by compelling him, as a condition to his right to continue to practice law in the State of Wisconsin, to be a member of and financially support an association of attorneys known as the State Bar of Wisconsin, which association functions substantially the same and carries on substantially the same work as voluntary associations of attorneys, and, among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion; and, therefore, are said orders, rules and by-laws, insofar as they coerce the appellant to be a member of and support said association, invalid on the ground that they are repugnant to the Constitution of the United States?

Dated this 5th day of May, 1960.

Trayton L. Lathrop, Appellant, Room 305, 122 West Washington Avenue, Madison 3, Wisconsin.

Leon E. Isaksen, Of Counsel for Appellant, Room 305, 122 West Washington Avenue, Madison 3, Wisconsin.

[fol. 83] Proof of Service (omitted in printing).

[fol. 84] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 85]

SUPREME COURT OF THE UNITED STATES

No. 200, October Term, 1960

TRAYTON L. LATHROP, Appellant,

vs.

JOSEPH D. DONOHUE.

ORDER POSTPONING CONSIDERATION OF JURISDICTION UNTIL HEARING ON MERITS—October 10, 1960

Appeal from the Supreme Court of the State of Wisconsin.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is set for argument immediately following No. 4.

October 10, 1960

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In the

Supreme Court of the United States

October Term, 1959

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT OF APPELLANT

TRAYTON L. LATHROP
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June 28, 1960

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In the

Supreme Court of the United States

October Term, 1959

No. .....

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT OF APPELLANT

I. DECISION APPEALED FROM.

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin. The opinion delivered in that court is reported as *Lathrop v. Donohue* (1960) 10 Wis. 2d 230, 102 N. W. 2d 404. The opinion is appended to this statement as a part of the appendix, pp. 1a-22a.

II. THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

A. *The Nature of the Proceeding.*

This is an action commenced in the Circuit Court for Dane County, Wisconsin, to recover from the appellee,* Joseph D. Donohue, the sum of Fifteen Dollars ($15.00) which was paid to him under the coercion of the rules adopted by the Supreme Court of Wisconsin which compel membership in and support of an association known as the State Bar of Wisconsin by all persons engaged in the practice of law in that state. It was asserted that the funds had been unlawfully obtained by the defendant from the plaintiff because said rules were in contravention of the Fourteenth Amendment of the United States Constitution. The action was transferred to the Circuit Court for Fond du Lac County, Wisconsin, at the request of the defendant. Said court, upon a demurrer to the complaint, entered judgment on October 23, 1959, dismissing the appellant's** complaint upon its merits. (R. 54-55, Ap. 39a-40a) The Supreme Court of the State of Wisconsin affirmed the Circuit Court judgment, holding that said rules do not violate the Fourteenth Amendment of the United States Constitution. (R. 58, Ap. 21a-22a)

---

*Hereinafter referred to as defendant.

**Hereinafter referred to as plaintiff.

B. *Dates of Judgment Appealed From and Notice of Appeal.*

The judgment of the Supreme Court of the State of Wisconsin, which is being appealed from, was dated April 5, 1960, and entered on April 5, 1960.

The notice of appeal was filed on May 5, 1960, in the Supreme Court of the State of Wisconsin.

C. *Statute Conferring Jurisdiction.*

Jurisdiction over this appeal is conferred by 28 U. S. C. section 1257 (2) which provides for appeals from the highest court of a state

> ". . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

D. *Cases Sustaining Jurisdiction.*

The rules of the Supreme Court of the State of Wisconsin constitute a statute under the provisions of said section 1257 (2). *King Mfg. Co. v. Augusta* (1927) 277 U. S. 100, 102-114; *Stevens v. Griffith* (1884) 111 U. S. 48, 50. See also *A. F. of L. v. Watson* (1946) 327 U. S. 582, 592.

E. *Statute Involved.*

The order of the Supreme Court of the State of Wisconsin promulgating for a period of two years from January 1, 1957, rules and by-laws for an association to be known as State Bar of Wisconsin is published in Volume 273 Wisconsin Reports on page vii to viii and is dated December 7, 1956. The opinion accompanying said order appears in 273 Wis. p. viii to x and in 79 N. W. 2d 441. The order of the court continuing the rules and by-laws in effect indefinitely is published in 5 Wis. 2d pp. 618, 627, and in 93 N. W. 2d 601, 605, and is dated December 22, 1958.

The rules and by-laws as originally adopted are published in 273 Wis. pp. xi to xxxvii. A copy of the rules and by-laws in the form in which they were effective on December 22, 1958 and at the time of institution of this action are attached to the complaint (R. 17a to 28a), and are published in the supplement to Volume 32, No. 1, Wisconsin Bar Bulletin, pp. 23-44 (Feb. 1959). The changes made in the original rules related only to dues for younger members and election procedure. *In re Integration of the Bar* (1958) 5 Wis. 2d 618, 620-621, 93 N. W. 2d 601, 602.

Portions of said rules and by-laws compel all persons practicing law in the State of Wisconsin to belong to and financially support the association described therein.

The State Bar Rules and By-laws provide in part as follows:

> "Each person licensed to practice law in this state shall enroll in the State Bar by registering his name with the secretary of the association within sixty days after the effective date of these rules, in accordance with

the requirements of the By-laws. Every person who becomes licensed, after these rules become effective, to practice law in this state shall enroll in the State Bar in like manner by registering his name with the secretary of the association within ten days after admission to practice. . . ." *(Rule 2, Section 2)*

"No individual other than an enrolled active member of the State Bar shall practice law in this state or in any manner hold himself out as authorized or qualified to practice law. . . ." *(Rule 2, Section 4)*

"Every active member shall pay membership dues in such amount not exceeding twenty dollars per year, as may be fixed in the By-laws, and every inactive member shall pay membership dues in such amount, not exceeding ten dollars per year, as may be fixed by the By-laws. All dues shall be paid to the treasurer of the association and shall contitute a fund for the payment of the expenses of the association." *(Rule 2, Section 5)*

"If the annual dues of any member remain unpaid at the expiration of ninety days from the time when such dues are due and payable, the membership of such member may be suspended by the board of governors in the manner provided in the By-laws, and no person whose membership is so suspended for non-payment of dues shall be entitled to practice law during the period of such suspension." *(Rule 2, Section 6)*

"Membership dues for each calendar year shall be due and payable to the treasurer on the second day of January of such year. Every active member shall pay annual dues of fifteen dollars, except that for the calendar year of admission to the Bar of this state or of any other state and for the next succeeding four calendar years the dues shall be eight dollars per year. Every inactive member shall pay annual dues of five dollars. . . ." *(By-laws, Art I, Section 2)*

". . . On the first day of April in each year the secretary shall deliver to the board of governors a list of all members whose dues remain unpaid after notification in the manner aforesaid, accompanied by proof of mailing the required notice of arrears in each case. Thereupon the board of governors by resolution shall suspend the membership of each such dues-delinquent member, and shall file with the clerk of the Supreme Court a certified copy of the resolution declaring the suspension, and shall mail a copy thereof to each person whose membership has been thereby suspended. . . ." *(By-laws, Art. I, Section 3)*

III. THE QUESTION INVOLVED RELATES TO COERCED MEMBERSHIP IN AND SUPPORT OF AN ASSOCIATION OF ATTORNEYS.

This appeal presents the question of whether a state, under the Fourteenth Amendment to the United States Constitution, may coerce lawyers to belong to and support an association of lawyers. The question has a direct bearing upon the larger question of whether the state, under the Fourteenth Amendment to the United States Constitution, may coerce any class of individuals to belong to an association.

The question, as presented in the Notice of Appeal, is as follows:

> "Do the orders and rules of the Supreme Court of the State of Wisconsin referred to in paragraph I of this Notice of Appeal and the rules and by-laws which were promulgated thereby deprive the appellant, who is a native of the State of Wisconsin and a resident licensed practicing attorney in said state and has no income outside of that received from the practice of

law, of his rights of freedom of association, assembly, speech, press, conscience and thought, or of his liberty or property without due process of law or deny to him equal protection of the law or otherwise deprive him of rights under the Fourteenth Amendment of the Constitution of the United States by compelling him, as a condition to his right to continue to practice law in the State of Wisconsin, to be a member of and financially support an association of attorneys known as the State Bar of Wisconsin, which association functions substantially the same and carries on substantially the same work as voluntary associations of attorneys, and, among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion; and, therefore, are said orders, rules and by-laws, insofar as they coerce the appellant to be a member of and support said association, invalid on the ground that they are repugnant to the Constitution of the United States?"

IV. STATEMENT OF THE CASE.

A. *Facts and Background.*

1. Status of Plaintiff and Defendant; Payment of Dues Under Protest.

The plaintiff is a native of the State of Wisconsin, a resident of the City of Madison in said state, and is engaged in the practice of law as a member of a law firm in said city. (R. 9)

He received a Bachelor of Arts degree from the University of Wisconsin in 1943, and after an interval for military service, was graduated from the Law School of the University of Wisconsin in 1948. (R. 9-10)

In February, 1948, the plaintiff was licensed to practice law in the State of Wisconsin, after having complied with all of the requirements therefor, and has been so licensed and has practiced law in the City of Madison, Wisconsin, ever since. (R. 10)

The plaintiff's only training and only means of livelihood is as a lawyer and he has no income outside of that derived from the practice of law. (R. 10)

Prior to January 1, 1957, there was an association of lawyers known as Wisconsin Bar Association. There was no coercion on the part of the state requiring the plaintiff to belong to that association or any other association. (R. 10) The plaintiff had been a member of the Wisconsin Bar Association from the time he had been admitted to the practice of law. (R. 10)

The statute involved which was adopted on Dec. 7, 1956 by the Wisconsin Supreme Court, in the form of rules, required all attorneys practicing law in the State of Wisconsin to belong to and support a state-wide bar association described therein as the State Bar of Wisconsin. (Supra 4-6) These rules became effective on January 1, 1957, and were to exist for two years. (R. 11) On December 22, 1958, the Wisconsin Supreme Court continued the rules in effect for an indefinite period of time. (R. 12)

As required by the said rules, the plaintiff enrolled in the State Bar of Wisconsin and paid the required dues for 1957 and 1958. (R. 12) However, the plaintiff paid the dues for the year 1959 under protest to the defendant on the ground that the rules violated the United States Constitution. (R. 15-16, 38-39) The defendant was the treas-

urer of the association. (R. 9) This action was brought on June 8, 1959 (R. 7) to recover the amount so paid.

2. Nature, Objects and Activities of the Wisconsin Association.

The State Bar of Wisconsin is substantially a continuation of the Wisconsin Bar Association with a different type of board of governors. It started out with the same general officers (R. 11), the same executive director (R. 13), the same property, the same files (R. 12) and the same publication. (R. 14) It selects the delegates to the American Bar Association which were formerly selected by the Wisconsin Bar Association. (R. 26) It functions in substantially the same manner and carries on substantially the same work as did the Wisconsin Bar Association. (R. 14)

The word "association" is used over 60 times in the rules and by-laws. (R. 17a-28)

The only difference between the functions of the association before and after the December 7, 1956 order is the compulsory membership and compulsory dues features introduced by said rules. (R. 14)

The State Bar of Wisconsin functions in substantially the same manner and carries on substantially the same work as does the American Bar Association, although on a smaller scale. (R. 14)

The State Bar of Wisconsin engages in a wide variety of activities.

It advances public acceptance of the objects and purposes of the organization, and in this connection uses its employees and funds to promote a ladies auxiliary. (R. 15)

It publishes a periodical, known as the Wisconsin Bar Bulletin, devoted to articles suggesting changes in the laws, discussion of present status of the laws, biographical sketches, advertising of books, publications, trust services, life and health insurance, and a variety of other matters. (R. 14)

One of the main objects and purposes of the association has been at all times to promote law reform in fields relating to the courts and the practice of law. This includes changes in laws and constitutional provisions relating to court systems, systems of selecting judges, tax codes, corporate codes, property codes, criminal codes, law among nations and laws affecting compulsory associations for lawyers. (R. 14-15)

Ten per cent of the $14,000.00 annual salary of the executive director is deemed by the association to be attributable to his lobbying activities on behalf of the association.[1]

The association has used its funds in opposition to the adoption of legislation favored by the plaintiff, and thus the association has acted contrary to plaintiff's convictions and belief. (R. 15)

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[1]Report of State Bar of Wisconsin dated June 6, 1960, and filed June 7, 1960 with Wisconsin Secretary of State. This report may be judicially noticed by the Wisconsin Supreme Court, **Wis. Truck Owners Ass. v. Public Service Comm.** (1932) 207 Wis. 664, 667, 242 N. W. 668, 674 and, therefore, it may be judicially noticed by the Supreme Court of the United States. **Adam v. Saenger** (1938) 303 U. S. 59, 63. See Wis. Stats. 1957, Sec. 13.70, which provides that registration as a lobbyist and reports as to lobbying need be done only when personal contacts are made with legislators. It is not required in connection with appearances before legislative committees.

Other activities of the association include postgraduate legal education of lawyers, public relations activities, discouraging unauthorized practice of the law, establishment of a minimum fee schedule, legal aid, investigation and adjustment of grievances, and publicizing pending and adopted legislative proposals. (R. 74-79, Ap. 16a-21a)

The statement of receipts and disbursements for the year 1959 which was referred to in the opinion of the court below (R. 75) is made a part of of the appendix. (Ap. 47a-48a) The resolution of the board of governors adopted on June 12, 1957 on the motion of Alfred E. La France which was approved by the Supreme Court in *In re Integration of Bar* (1958) 5 Wis. 2d 618, 621, 93 N. W. 2d 601, is also made a part of the appendix.[2] (Ap. 42a-46a)

3. Nation-Wide History and Nature of the Compulsory (Integrated) Bar Association Movement.

Wisconsin is not unique in adopting rules compelling attorneys to become members of and support a bar association. At least 25 other states are reported to have provided for compulsory bar associations, which are referred to as "integrated bar" associations. *In re Integration of Bar* (1958) 5 Wis. 2d 618, 621, 93 N. W. 2d 601, 603.

The integrated bar idea was formulated and pushed by Herbert Harley who was the founder and for many years the secretary of the American Judicature Society. Harley was a lawyer who gave up the law practice and became a newspaper editor. With the financial backing of

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[2]This may be judicially noticed. See the cases cited in footnote 1, supra. See also the statement of the court below on judicial notice. (R. 66-67, Ap. 8a; R. 71, Ap. 13a)

Charles F. Ruggles, a well-to-do lumberman, Harley organized the Society in 1913 after spending a year, on a salary paid by Mr. Ruggles, contacting and obtaining the assistance of leading lawyers, judges and law teachers throughout the country, including Pound, Wigmore, and Chief Justice Winslow, of the Wisconsin Supreme Court. Originally the society was conceived to be largely a research organization, but during World War I while the directors were distracted with war duties, Harley started the Journal of the society, a paper distributed free of charge to lawyers throughout the country. Thirty-five thousand copies of the first issue were distributed. Ruggles, remaining always in the background without permitting the use of his name, supported the society until 1925, having contributed more than $93,000.00.[3]

The first issue of the Journal was published in June 1917 and it urged that there should be a movement for integrating the profession.[4]

The Journal published a proposed model act in 1918.[5] In support of the act it was urged that judiciary committees of the legislatures snub state bar associations because they represent only a fraction of the attorneys.[6]

It was stated, however, that at the beginning compulsory membership may not be possible because it would invite the opposition of the unfit and of skeptical worthy

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[3]**The American Judicature Society and its Work** by Glenn R. Winters, 10 Alabama Lawyer, pp. 201-209 (1949). "The greatest single accomplishment of the American Judicature Society has been its promotion of Bar integration." Ibid 207. See also Vol. 28, Journal of the Bar Association of the State of Kansas, pp. 333, 334 (Feb. 1960).

[4]Volume 1, #1, Journal American Judicature Society, June 1917, p. 21.

[5]Volume 2, #4, Ibid, pp. 105, 111-124 (Dec. 1918).

[6]Ibid, p. 107.

lawyers.[7] Section 3 of the model act had a provision for compulsory membership which was to be used at the option of the particular state.[8]

Section 28 (c) of the act provided that "The Board [of Governors] shall have the power to take such action as may promote the social intercourse of the members and aid in the improvement of the administration of justice in the State."[9]

Coupled with the campaign for the integrated bar the Journal of the Society gave prominence to the idea that the bar associations must exercise influence upon the electors and the legislators. A paper by William D. Guthrie published in 1921[10] urged that "A special and urgent duty of education and propaganda rests upon the Bar of the present generation. . . ."

In an address before the Oregon State Bar Association in 1924, Mr. Harley stated:

> "The bar ordinarily finds it difficult and sometimes impossible to influence the legislature. . . ."[11]

He stated:

> "One of the reasons often urged for integration is that the un-integrated bars of the past and present, while performing some excellent work in legislation, seldom see their drafts enacted into law. It is obvious that an integrated bar would have a great deal more

[7]Ibid, p. 109.

[8]Ibid, p. 111.

[9]Ibid, pp. 117-118.

[10]Vol. 5, #2, Ibid, p. 41 (Aug. 1921).

[11]Vol. 8, Ibid, p. 72 (Oct. 1924).

persuasive force with legislatures than now obtains. . . . "[12]

Anticipating constitutional questions, Mr. Harley stated that a lawyer is merely a ". . . privileged officer of the state . . ." and has no ". . . right under natural law, or under common law or under any constitution to be a lawyer. . . ."[13]

On another occasion Harley urged that the state could make lawyers a body of salaried civil servants, could define the activities of every lawyer and his earnings, could restrict to any extent the number of lawyers, could forbid a union of lawyers, as hostile to popular government, and could discharge lawyers at the end of any annual term."[14]

As a result of the prodding of the Society, North Dakota adopted an integrated bar act in 1921,[15] and numerous states have followed suit.

The campaign is still going on. Currently the integrated bar idea is being advanced in Kansas. It is urged there that:

> ". . . In many instances proposed legislation becomes law as pressure is exercised and influence of large groups is brought to bear upon the legislative body demanding its enactment. The individual today speaks with little authority unless he has the backing of some organized group. Our Kansas Bar Association has, and continues to work for better and more operative legislation. They are somewhat hampered in that

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[12]Ibid, p. 79.

[13]Ibid, p. 74.

[14]Vol. 8, Law Society Journal, pp. 80, 88 (May 1938).

[15]Vol. 5, #1, Journal American Judicature Society, June, 1921, p. 16.

they are not an official statutory organization, nor do they represent all the attorneys of the state. . . ."[16]

The integrated bar movement, so far, has had comparatively little success in the Middle Atlantic, Midwestern, Eastern and New England States.[17]

For example, the integrated bar was first considered in New York in 1919. A bill to provide for an integrated bar which, among other things, would nominate candidates for judicial office, was defeated in 1925 and since then it has not received any serious consideration in that state.[18]

The pattern for integrated bars throughout the country is substantially the same, although there is variation as to whether it is provided for by enactment of the highest court or by enactment by the legislature.[19]

Throughout the country the functions of an integrated bar are substantially the same as those of a voluntary association.[20] The power of an integrated bar is ordinarily no greater than that of a voluntary group ". . . except for that additional power which results from a larger membership and greater economic resources. . . ."[21]

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[16]Vol. 28, Journal of The Bar Association of the State of Kansas, pp. 333, 335 (Feb. 1960).

[17]**An Analysis of the Integrated Bar** by Clarence F. Giles, 17 Albany Law Review, pp. 231, 232 (1953).

[18]Ibid, pp. 239-240.

[19]Ibid, p. 232.

[20]Ibid, p. 235.

[21]Ibid, p. 235.

4. History and Nature of the Movement In Wisconsin.

In Wisconsin, the integration idea had been considered by the Wisconsin Bar Association as early as 1923.[22] In 1935 a bill for creation of a compulsory bar association known as the "Wisconsin Bar Association" was passed by both houses of the legislature, but vetoed.[23] Bills for integration were introduced in the 1937, 1939, and 1941 legislatures, but failed of passage.[24]

In 1943, a bill authorizing the Supreme Court to provide for a compulsory association to be known as "State Bar of Wisconsin," was passed by both houses of the legislature, but was vetoed.[25] The veto was purportedly overridden. The act was published as section 256.31 Wisconsin Statutes. A controversy arose as to whether the necessary two-thirds vote of those present in the assembly was obtained. The Wisconsin Supreme Court, in a self advisory opinion, ruled that the veto was validly overriden,[26] and also ruled that the act did not delegate legislative powers and did not deny equal protection of the laws.[27] Justice Fowler dissented, stating that membership in an integrated bar had no bearing on the qualifications of a person to act as an attorney, and that if the legislature may cause integra-

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[22]See history of bar integration in Wisconsin set forth in **Integration of Bar Case** (1943) 244 Wis. 8, 14, 11 N. W. 2d 604, 607.

[23]Ibid, Bill Jacket for Bill 119-S, 1935 Legislature, Secretary of States Office of State of Wisconsin.

[24]244 Wis. p. 14, 11 N. W. 2d p. 607.

[25]244 Wis. p. 16, 11 N. W. 2d p. 608. See veto message of Governor Walter S. Goodland, pp. 40a-41a of appendix.

[26]244 Wis. pp. 16-36, 11 N. W. 2d pp. 609 to 617.

[27]244 Wis. pp. 36-45, 11 N. W. 2d pp. 617 to 621.

tion of the bar it may likewise organize any trade or class of workmen.

No rules were considered, and the court decided not to adopt any rules at the time."

In 1946 the President of the Wisconsin Bar Association petitioned for integration of the bar. The Wisconsin Supreme Court, with one new Justice since its 1943 decision, who did not participate, declined to order integration. The court stated that an integrated bar could not use its dues to maintain a legislative agent, that it doubted that it could conduct propaganda in defense of the legal profession and that it could not seek legislative definition of the bounds of the legal profession."

In 1955 the movement for integration of the bar was revitalized by Alfred E. La France, President of the Wisconsin Bar Association. He urged that all lawyers of the state should participate in legislative matters, in determining the qualifications of attorneys, in problems of judicial administration, in judicial selection, in legal aid, in handling grievances and in a "vast program" of public relations. With respect to legislative work, he stated:

> "All of the lawyers of the state, through their association, should participate in making recommendations for changes and advancements in the procedural and substantive law of the state; all of the lawyers of the state through their unified association, should actively participate in the molding of all future legislation and in promoting educational programs concerning proposed and considered constitutional changes.""

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[28]244 Wis. pp. 54, 56a-56b, 11 N. W. 2d p. 625, 12 N. W. 2d 699-700.

[29]**In re Integration of Bar** (1946) 249 Wis. 523, 529, 25 N. W. 2d 500, 502-503.

[30]28 Wis. Bar Bulletin, No. 5, p. 6 (Oct. 1955).

On petition by Mr. La France and others, authorized by the House of Gorvernors of the Wisconsin Bar Association, alleging that only 68% of the lawyers in the state are members of the Wisconsin Bar Association,[31] the Supreme Court of Wisconsin, in June 1956, decided to order integration of the bar and directed that rules be drawn by the petitioners.[32] The reason assigned was that it would result in the registration of all lawyers then practicing in the state.[33] All of the members of the court participating in the 1946 decision, except for one, had been replaced.

Rules for integration were adopted on December 7, 1956, for a period of 2 years from January 1, 1957,[34] pursuant to the inherent power of the court, rather than statutory authority. (R. 17-A)

On December 22, 1958, the Wisconsin Supreme Court continued the integrated bar rules, with minor changes made since 1956, for an indefinite period of time.[35] The court commended the board of governors for the legislative procedure and working rules which were adopted by it.[36] It stated that the integrated bar does not control the thinking of any of its members, that every one understands that the policies of State Bar are distinct from each individual, that individuals can express their own opinion, and that it is

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[31]21 Wis. Bar Bulletin, No. 2, p. 21 (April 1956) (R. 11).

[32]**In re Integration of Bar**, (1956) 273 Wis. 281, 285, 77 N. W. 2d 602, 604.

[33]273 Wis. pp. 284-285, 77 N. W. 2d 604.

[34]273 Wis. vii et seq., 79 N. W. 2d 441-442 (R. 11).

[35]**In re Integration of the Bar** (1958) 5 Wis. 2d 618, 627, 93 N. W. 2d 601, 605 (R. 12).

[36]5 Wis. 2d p. 621, 93 N. W. 2d p. 602. The procedure is set for in the appendix pp. 42a to 46a.

an independent, democratic organization."[17] The court expressly overruled the contrary statements in the 1946 opinion."[18]

B. *The Circuit and Supreme Courts of the State of Wisconsin Decided That the Statute Involved Is Valid and Not Repugnant to the Fourteenth Amendment.*

The United States Constitutional question sought to be reviewed was raised in the complaint in this action which was filed in a Circuit Court for the State of Wisconsin. (R. 16, 40, Ap. 23a)

The defendant demurred to the complaint upon three grounds, namely (1) that the circuit court lacked jurisdiction over the subject matter of the action, (2) that there was a defect of parties defendant, and (3) that the complaint does not state a cause of action. (R. 34)

The circuit court ruled against the plaintiff on each of the three grounds. (R. 46-51, Ap. 33a-39a)

The circuit court held that if the practice of law were a matter of right, there would be a "serious question" as to the validity of the rules requiring the payment of dues. The court held, however, that the practice of law is only a privilege and therefore no one is being deprived of any right under the Constitution of the United States. (R. 49-50, Ap. 37a)

The judgment of the circuit court dismissed the complaint "upon its merits." (R. 54-55, Ap. 39a-50a)

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[17] 5 Wis. 2d p. 623, 93 N. W. 2d p. 603.

[18] 5 Wis. 2d p. 626, 93 N. W. 2d p. 605.

The United States Constitutional question was again raised in the Wisconsin Supreme Court by appeal to that court from the judgment of the circuit court.

The Supreme Court of Wisconsin stated that, "This court has determined to consider the constitutional issue raised on its merits and not to dispose of its appeal upon procedural grounds." (R. 62, Ap. 3a)

The Wisconsin Supreme Court stated that, "The plaintiff bottoms his contention, that the integration of the bar is unconstitutional, upon the thesis that such integration violates the First Amendment freedoms of free speech, press, assembly and petition which are inherent in the due-process and equal-protection-of-the-laws clause of the Fourteenth Amendment. . . ." (R. 63, Ap. 4a) The Wisconsin Supreme Court also stated that the plaintiff argues that ". . . the right not to belong to an association is also a freedom protected by the Fourteenth Amendment. . . ." (R. 64, Ap. 5a)

The court further stated that the rules do not compel the plaintiff to associate with anyone, and do not compel him to attend meetings, but merely require him to pay annual dues to the association. (R. 64-65, Ap. 6a)

The court held that the right to practice law is not a right but is a privilege subject to regulation; provided that the regulations do not impose an unconstitutional burden or deny due process. (R. 65, Ap. 6a)

The court held that it is of the opinion that ". . . the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administra-

tion of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. . . ." (R. 67, Ap. 9a)

The court held that it was entitled to balance its determination of public interest against rights of free speech, assembly or petition. (R. 70, Ap. 11a)

The order and judgment of the Wisconsin Supreme Court declared that its rules adopted and continued in force by its orders dated December 7, 1956, and December 22, 1958, do not violate the Fourteenth Amendment of the Constitution of the United States and affirmed the judgment of the circuit court. (R. 58, Ap. 21a)

V. A SUBSTANTIAL AND IMPORTANT UNITED STATES CONSTITUTIONAL QUESTION IS INVOLVED.

A. *The Question Involved Is of National and World-wide Significance.*

The question of whether the several states or the United States may convert private voluntary associations into compulsory associations, is not only of national but of world-wide significance.

It is of national significance since over one-half of the states of the United States have converted voluntary associations of lawyers into compulsory associations—all since World War I.

It is of world-wide significance since Article 20, section 2 of the Universal Declaration of Human Rights provides that

"No one may be compelled to belong to an association."[9]

The significance of the case is not limited to one occupation or profession, but it extends to all occupations and all other classifications of the people now or hereafter made.

The significance extends to teachers' associations, medical associations, and trade associations. It extends to associations of manufacturers who do business with the government. It extends to associations and parties of governmental employees and office holders.

The significance extends to associations and groups organized on a national level. If a state can compel its lawyers and teachers to belong to a state-wide association, the national government may compel lawyers who give advice on federal questions or practice in federal courts and teachers and college professors who are paid with the aid of federal moneys to belong to nation-wide associations.

The idea that the force of the state should be used in fostering compulsory associations is in comparative infancy in this country, but has already made serious inroads.

As associations of all kinds are organized and integrated, government by class and corporations of classes is substituted for government by the whole people.

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[9]Basic documents of the United Nations, edited by Louis B. Sohn (1956) pp. 132, 134.

B. *Voluntary Associations Form the Basis for Political Liberty.*

John R. Commons, of the University of Wisconsin, one of the greatest political economists of our time made astute observations of the compulsory syndicates (associations) in Italy—the capitalist syndicates, the agricultural syndicates, the labor syndicates and the professional syndicates:

> ". . . In order to carry on business or get a job each individual is compelled to become a member or at least pay dues to support his syndicate. . . ."
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> * * *
>
> "It is these compulsory corporations that have taken the place of parliament. They are both political and economic. . . ." INSTITUTIONAL ECONOMICS (1934) by John R. Commons p. 883.

Commons emphasized the absolute requisite of "voluntary associations" to the American type of government:

> ". . . *every generation must review its bill of rights.* They are the rights not only of free speech, free press, and free investigation, *but most important, the rights of free association. . . .*" *Ibid*, p. 901 (Emphasis added)
>
> ". . . They [the people] retain liberty for themselves by collective action, either *by voluntary associations* or political parties." *Ibid*, p. 902 (Emphasis added)

C. *Freedom of Association Is Protected By Many Guarantees Entailed In the Fourteenth Amendment.*

Freedom of association is protected by the Fourteenth Amendment of the United States Constitution against state action. *Bates v. City of Little Rock* (1960) 361 U. S. 516, 523.

It is necessarily implicit in the guarantees of liberty of the Fourteenth Amendment that persons shall not be required to join associations or parties.

It is not an answer to say that the practice of law is a privilege, as the court below did. (R. 65, Ap. 6a). Other courts have justified their action on the same ground. This is erroneous. See pp. 28-29, *infra*.

It is no answer to say as did the court below that the requirement of payment of dues to an association does not deprive one of his rights of free speech, assembly or petition.[*] (R. 70, Ap. 13a) Anyone with only the rudiments of constitutional rights in mind, would vehemently assert that exaction of annual dues to support the Socialist, Republican or Democratic parties is a deprivation of his freedom of speech, assembly and petition. The exaction gives those in control of the organization the economic power to speak with an amplified voice so as to obliterate and lessen the effect of the words of the minority. It is inherent that ones right of speech, assembly and petition are im-

[*] That a state may often regulate occupations and impose a reasonable special tax to cover the cost of such regulation by the state is not questioned, provided that the regulations "have a rational connection" with the fitness of individuals to engage in the occupation. **Schware v. Board of Bar Examiners** (1957) 353 U. S. 232, 239. The power to tax or to regulate does not include the power to expropriate money from one person or group for the benefit of another. **United States v. Butler** (1935) 297 U. S. 1, 61.

paired. Also, it is an imposition upon one's right of freedom of conscience to compel him to be a member of an association or support causes. See *Thomas v. Collins* (1945) 323 U. S. 516, 530-531; *Speiser v. Randall* (1958) 357 U. S. 513, 535-536 (concurring opinion).

Nor it is an answer to say that the activities of the association or party are limited only to matters which directly bear upon the occupation of the members.

The court below emphasized that the rules and by-laws limit legislative activity of the association to matters affecting the courts, and judges, and the practice of law. (R. 66-67, Ap. 8a) This, of course, is not a narrow, but an extremely broad field.

What can be more important, more substantive, more vital to the government than the court system! It is one of the three major divisions of government. What kind of a judiciary a state has is, at least, as important as what kind of a legislature it has or what kind of an executive or what kind of boards and bureaus the state shall have!

Most all associations are political parties of at least a limited nature, even though they do not support named candidates. Their position on public issues necessarily affects the fate of candidates. Integrated bar associations are no exception. Indeed, one of the prime reasons for the requirement of compulsory membership is to make the association stronger politically.

Nor is it an answer, as the court below stated, that the association is like a judicial council. (R. 70-71, Ap. 12a-13a) A judicial council may be assumed to be in the nature of a committee of the legislature. Compulsory membership in

every association could be justified for the same reason—that it is a committee of the legislature with respect to the matter in which it is particularly concerned. However, a committee of the legislature does not act as a pressure group or have a lobbyist. A group cannot be considered a committee of a legislature when the legislature does not have or gives up the responsibility of directing the activities of the group. Cf. *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 255. By the same token, it cannot be considered to be a committee of the court. See the statement of the Wisconsin Court that it is devoted to the ". . . ideal of a free and independent bar. . . ." (R. 68, Ap. 9a-10a)

Nor it is an answer to say as did the court below, that the integrated bar is a public body. (R. 10, Ap. 12a) If it is public it is only by virtue of the compulsion which is at issue here. All associations which are supported by the coercion of the state, may be deemed to be public by the same reasoning. But this does not make the support valid.

Coercion by the state to support associations, in addition to violating freedoms of speech, press, assembly and petition, is in contradiction of the equal protection clause of the Fourteenth Amendment.

Judge T. M. Cooley, the learned and astute commentator on constitutional law, stated that laws are not necessarily equal because purportedly they act upon all alike. He stated that a general law may establish regulations upon subjects not properly within the provisions of government and be cheerfully submitted to by the majority. Yet to the minority it may be ". . . in the highest degree offensive, unjust and tyrannical. . . ." He was of the opinion that a law for compulsory attendance upon the church

of the majority or the political meetings of the majority or the sports of the majority would by its very universality constitute offensive discrimination. Judge Cooley stated, ". . . Would not . . . its very universality, constitute offensive discrimination, precisely because it would compel conformity where equality of right would demand liberty of choice? . . ." *Story's Commentaries on the Constitution of the United States* (5 ed) (1891) Vol. 2, Chapter XLVII by T. M. Cooley, Section 1939, page 690.

D. *The Supreme Court of the United States Has Not Passed Upon the Question Here Involved.*

The Supreme Court of the United States has not passed upon the validity of any enactment, either federal or state, coercing persons to belong to or support an association as against a contention that it violates the guarantees of civil and political liberties. Cf. *Railroad Employees Department A. F. L. v. Hanson* (1956) 351 U. S. 225, 238, 242. There is now pending, however, a case where such a question may be decided. *International Association of Machinists et al. v. Street et al.*, No. 258, O. T. 1959.

E. *There Is Little Judicial Opinion On the Subject, and What There Is, Is Divided.*

1. Judicial Opinion In the Several States.

Although it is reported that over one-half of the states have compulsory associations of attorneys, very little discussion of the question here presented has occurred outside of that in the Wisconsin Court.

In Michigan, federal constitutional questions were raised, and disposed of on the ground that there is no constitutional right to practice law. *Ayres v. Hadaway* (1942) 303 Mich. 589, 6 N. W. (2d) 905, 907. *Emmons v. Smith* (D. C. E. D. Mich. S. D. 1944) 58 F. S. 869, 873.

In Minnesota, although the court did not order integration of the bar, it asserted that it had the right to do so on the ground that the practice of law is not a property right protected by the United States Constitution. *Petition for Integration of Bar* (1943) 216 Minn. 195, 12 N. W. 2d 515, 518 (1948) 226 Minn. 578, 34 N. W. 2d 157.

In Nevada, the court held that the United States Constitution is not violated because the right of citizens to follow common industrial occupations does not apply to the pursuit of the professions. *In re Scott* (1930) 53 Nev. 24, 292 P. 291.

The Circuit Court for Fond du Lac County, Wisconsin, in the case now before this court, held that there would be a serious question as to the constitutionality of rules requiring the payment of annual dues to the bar association if it were not that the practice of law is a mere privilege

not protected by the United States Constitution. (R. 49-50, Ap. 37a)

The idea announced by the foregoing courts is similar to that of Herbert Harley of the American Judicature Society. See *supra*, p. 14.

That the idea is erroneous is without question. *Royall v. Virginia* (1886) 116 U. S. 572, 583; *Schware v. Board of Bar Examiners* (1957) 353 U. S. 232, 238-239; *Green v. McElroy* (1959) 360 U. S. 474, 492. See also *Frost Trucking Co. v. Railroad Commission* (1926) 271 U. S. 583, 593-594.

There is no place in the constitutional system of the United States for the idea that any occupation, calling, or profession is a mere privilege in the absolute control of those temporarily holding the reins of the government. Enjoyment of life, the means of pursuing and obtaining happiness and safety have been deemed from the beginning of this country to be part of the liberty guaranteed by the United States Constitution.[1] The learning and the practice of law is perhaps the most fundamental of all means of obtaining happiness and safety in a constitutionality governed society.

The only other expression of judicial opinion, so far as we have been able to ascertain, which bears upon whether civil or political liberties have been violated by state coercion of support of bar associations, is found in the states of Arkansas, California, Idaho, Louisiana and New Mexico.

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[1] Amendments to the United States Constitution proposed by 1788 conventions of Virginia, New York and North Carolina. The FEDERALIST, edited by Paul L. Ford (1898) pp. 635, 639, 646. When a state confers a license to engage in a profession, it becomes a "valuable personal right" **Corrao v. Mortier** (1958) 4 Wis. 2d 492, 497, 90 N. W. 2d 623.

In Arkansas, the majority of the court held that a requirement of payment of dues to the association does not interfere with any freedom of choice. However, two dissenting Justices strongly urged that "liberty of thought" was violated and that there were serious constitutional objections. Subsequent manifestation of opinion by lawyers brought about the rescision of the court order for integration. *In re Integrating the Bar* (1953) 222 Ark. 35, 259 S. W. 2nd 144.

In California, the only holding on U. S. Constitutional issues is that procedural due process is not violated by the power of the association in disbarment matters, because its action is subject to review by the court. *In re Petersen* (1929) 208 Cal. 42, 280 P. 124, 125; *State Bar v. Jones* (1929) 208 Cal. 240, 280 P. 964.

In Idaho, a divided court held a compulsory bar association to be invalid. Two of the five man court based their decision, in part, on the ground that if there were to be compulsory associations for various callings, instead of a representative democracy, we would have class government. *Jackson v. Gallet* (1924) 39 Idaho 382, 228 P. 1068-1072. Subsequently integration was ordered by *In re Edwards* (1928) 45 Idaho 676, 266 P. 665, after a statutory change, meeting state constitutional objections. One Justice dissented objecting to compulsory exaction of funds for private interests. The majority held that since the dues were paid into the State Treasury and disbursed according to law, there could be no objection.

In Louisiana, the court held that the requirement of payment of dues to the bar association does not deprive attorneys of their freedom not to join the association, because

to so hold would deny the authority of the court to organize an integrated bar. *In re Mundy* (1942) 202 La. 41, 11 So. 2d 398, 401.

In New Mexico, the court held that no one is compelled to join an association because the integrated bar is not an association. *In re Gibson* (1931) 35 N. Mex. 550, 4 P. 2d 643, 648-649.

2. Judicial Opinion in Wisconsin.

In Wisconsin, there has been a split of judicial opinion. In *Integration of the Bar Case* (1943) 244 Wis. 8, 44, 11 N. W. 2d 604, 620, 12 N. W. 2d 699, a majority of the court held that integration would not violate the equal protection clause. Justice Fowler dissenting, pointed out that if lawyers may be integrated, so may the barbers, plumbers, machinists or the members of any other trade or class of workmen. 244 Wis. p. 56; 11 N. W. 2d p. 625.

Three years later, at least a majority of the same court raised questions as to whether the court may integrate the bar for the purpose of supporting a legislative agent or engaging in propaganda. *In re Integration of Bar* (1946) 249 Wis. 523, 529, 25 N. W. 2d 500, 502-503. But after another passage of time, at least a majority of the same court, composed, however, of different members, disagreed with these statements. *In re Integration of the Bar* (1958) 5 Wis. 2d 618, 626, 93 N. W. 2d 601, 605.

3. Judicial Opinion As to Other Types of Associations.

On the question of compulsory membership in other types of associations, judicial opinion as to the effect of guarantees of civil and political liberties is also divided, although the reason for division may be obscured in part by varying views as to what constitutes state action. *De Mille v. American Federation of Radio Artists* (1947) 31 Cal. 2d 139, 187 P. 2d 769; *Allen v. Southern Ry. Co.* (1959) 249 N. C. 491, 107 S. E. 2d 125; *International Association of Machinists v. Street* (1959) 215 Ga. 27, 108 S. E. 2d 796, on appeal No. 258 O. T. 1959. See also *Hagen v. Culinary Workers Alliance* (1952) 70 Wyo. 165, 246 P. 2d 778, 788-789.

F. *Unless the U. S. Supreme Court Grants a Hearing, the Plaintiff Will Have No Right to Be Heard By An Independent Tribunal.*

The Wisconsin Supreme Court decided the constitutionality of its own enactment. Here we are faced with the unique situation where it is the action of the state court itself which might result in the denial of constitutional rights. If the United States Supreme Court were to deny a hearing, the plaintiff would have no right to be heard by an independent tribunal. See *Barrows v. Jackson* (1952) 346 U. S. 249, 257.

G. *The Wisconsin Supreme Court Erred in Balancing What It Deemed To Be the Public Interest Against First Amendment Freedoms and Freedom of Association In the Absence of a Compelling Subordinating Reason.*

The heart of the decision in the Wisconsin Supreme Court is its holding that where regulatory measures are attacked as infringing First Amendment freedoms, the courts are required to balance the competing "public and private" interests at stake and that since the court has determined that it promotes the public interest to have public expression of the majority of the lawyers of the state with respect to legislation affecting the administration of justice and the practice of law, there is no interference with rights of free speech, assembly or petition. (R. 69-70, Ap. 11a-12a)

The Wisconsin Supreme Court, in making this statement, failed to observe the principle that in judging state action claimed to infringe rights of free association, the "*subordinating interest of the State must be compelling*" (emphasis added), in order to overcome individual constitutional rights at stake. *Barenblatt v. United States* (1959) 360 U. S. 109, 127; *Bates v. City of Little Rock* (1960) 361 U. S. 516, 523.

The court also overlooked the rule that freedom of speech, though not absolute, is protected unless shown that it is likely to produce a clear and present danger of substantive evil that arises far above public inconvenience, annoyance or unrest. *Terminiello v. Chicago* (1948) 337 U. S. 1, 4.

The court does not mention any compelling interest or clear and present danger which requires the court's enact-

ments. Indeed, it may be assumed that a majority of the members of the Court were unwilling to subscribe to the idea that there is a compelling subordinating interest which requires the enactment of rules which coerce attorneys to become members of a bar association.

The heavy burden of making a showing of such a subordinating compelling interest is upon those seeking to sustain the enactment. *Burstyn v. Wilson* (1951) 343 U. S. 495, 504.

The fact that an act is claimed to be in the public interest is not enough to sustain the burden. The aim of public peace, for example, cannot be accomplished by laws which deny rights protected by the Federal Constitution. *Buchanan v. Warley* (1917) 245 U. S. 60, 81. Mere legislative preference or beliefs respecting matters of public convenience is not sufficient. *Schneider v. Irvington* (1939) 308 U. S. 146, 161.

H. *Conclusion.*

The question involved here is of profound national and world-wide significance.

The question is substantial. Coercion of the state causing membership in and support of associations transgresses the most fundamental of the United States constitutional guarantees. It strikes at the heart of our republican form of government. It is in defiance of the "central idea" of the United States Constitution.

The United States Supreme Court has not passed upon the question here presented.

There is very little, if any, authority sustaining the lower court's decision. Indeed, the decision is in conflict with an earlier decision by the Wisconsin Supreme Court. What little authority there is in other states is divided.

The appellant has no opportunity for a hearing by an independent tribunal unless the United States Supreme Court grants a hearing.

The Wisconsin Supreme Court erred in weighing its determination of what is in the public interest against the rights of free association, speech, press, conscience, assembly and petition, in the absence of a subordinating interest compelling the court to do so.

It is respectfully requested that the Supreme Court of the United States take jurisdiction over this appeal.

Respectfully submitted,

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APPENDIX

59-79 OPINION OF THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED APRIL 5, 1960
(Formal parts omitted)

59 APPEAL from a judgment of the circuit court for Fond du Lac county: RUSSELL E. HANSON, Circuit Judge. *Affirmed.*

Action commenced June 8, 1959, by Trayton L. Lathrop to recover the sum of $15 paid by him to the defendant Joseph D. Donohue under an alleged unconstitutional compulsion.

The material allegations of the complaint are as follows: The plaintiff was admitted to practice of law by the supreme court of Wisconsin in 1948 and since his admission he has practiced his profession at the city of Madison. The defendant is the treasurer of the State Bar of Wisconsin (hereinafter referred to as the "State Bar") which was integrated on a trial basis in 1956, by order of the supreme court of Wisconsin, and functions under the rules and
60 by-laws of such organization approved by further order of the same court. This integration of the bar was continued in effect on a permanent basis by further order of such court entered December 22, 1958. Such rules and by-laws impose compulsory membership and the payment of annual dues upon all persons admitted to practice law and engaged in the active practice of law in the state as a requisite of such persons continuing in such active practice. On or about March 6, 1959, the plaintiff paid under protest

to the defendant the sum of $15 to cover his annual dues to the State Bar for the calendar year 1959, and accompanied such payment with a letter which stated that such payment was made under compulsion of the by-laws of such organization requiring such payment, and that the plaintiff would hold the defendant personally liable for the amount so paid. The supreme court's order of December 22, 1958, insofar as it coerces the plaintiff to support the State Bar, is alleged to be unconstitutional on the ground that it violates the Fourteenth amendment of the United States constitution and art. I of the Wisconsin constitution.

The defendant demurred to the complaint on the following three grounds:

"1. The court lacks jurisdiction over the subject matter of the action in that exclusive jurisdiction thereof is vested in the Supreme Court of the State of Wisconsin.

"2. There is a defect of parties defendant in that the State Bar of Wisconsin is a necessary party.

"3. The complaint does not state facts sufficient to constitute a cause of action."

The trial court filed a memorandum decision in which the facts and the legal authorities were carefully and comprehensively considered, and determined that the demurrer must be sustained on all three grounds. An order
61 sustaining the demurrer was accordingly entered. Under date of October 23, 1959, judgment was rendered dismissing the complaint upon its merits. From such judgment the plaintiff has appealed.

62 CURRIE, J. This court has determined to consider the constitutional issue raised on its merits and not to dispose of the appeal upon procedural grounds.

While we are of the opinion that the learned trial court properly determined that the circuit court was without jurisdiction to pass upon the validity of an order of this court which regulates the practice of law, we will treat the action as though it had been originally and properly brought in this court. The reason for so doing is that this action is one *publici juris* in which we have had the benefit of most thorough and adequate briefs and oral argument upon the constitutional issue presented. Under such circumstances we deem it would work an injustice to dismiss the action and compel the plaintiff to commence a new proceeding in this court to relitigate the same issue.

The other procedural ground upon which the trial court sustained the demurrer to the complaint was that there was a defect of parties defendant. In so holding, the trial court determined that the State Bar is an indispensable party to this litigation under sec. 260.19 (1), Stats. However, we deem that there may be some merit to the plaintiff's contention that in order to rule that there is a defect in parties defendant it is necessary to decide the constitutional issue. This is because, if the orders of this court creating the State Bar an entity are void, then it has no standing which would require it to be made a party. We are satisfied that counsel for the defendant Donohue has so competently marshaled the facts and the law in support of the constitutionality of the orders creating the State Bar that its interests do not require that it be made a party.

63 Both the trial court and this court possess the power to have compelled, on the court's own motion, the im-

pleading of it as a party defendant, if its interests were deemed to require that this be done, as an alternative to dismissal of the action because of failure of the plaintiff to have joined it as a party.

The plaintiff bottoms his contention, that the integration of the bar is unconstitutional, upon the thesis that such integration violates the First amendment freedoms of free speech, press, assembly, and petition which are inherent in the due-process and equal-protection-of-the-laws clauses of the Fourteenth amendment. He also claims that there is a violation of these same freedoms as stated in various sections of art. I of the Wisconsin constitution. However, such provisions of the Wisconsin constitution are substantially the equivalent of the due-process and equal-protection-of-the-laws clauses of the Fourteenth amendment. *Boden v. Milwaukee* (1959), 8 Wis. (2d). 318, 324, 99 N. W. (2d) 156, and *Pauly v. Keebler* (1921), 175 Wis. 428, 185 N. W. 554. We are satisfied that if the orders creating and continuing the State Bar violate the provisions of art. I of the state constitution they also violate the Fourteenth amendment. We will, therefore, confine our consideration of the constitutional issue to whether there exists a violation of the Fourteenth amendment.

In *Integration of Bar Case* (1943), 244 Wis. 8, 11 N. W. (2d) 604, the argument was advanced that the statute enacted by the legislature (ch. 315, Laws of 1943), which provided for this court integrating the bar, violated the Fourteenth amendment. Mr. Chief Justice ROSENBERRY in his opinion for the court dealt with such argument at pages 41 to 44 thereof. It was there determined that an integration of the bar would not violate the Fourteenth amendment.

64 While we might ground our decision of the instant case on this sound precedent authored by one of the great chief justices of this court, we choose not to do so. This is because the plaintiff has advanced some arguments that were not presented to the court when it previously considered the constitutional issue in 1943.

The plaintiff commences his argument with the sound premise that the right of any person to belong to an association embodies certain First amendment freedoms protected by the Fourteenth amendment. As the United States supreme court recently declared in *Bates v. City of Little Rock* (1960), — U. S. —, 80 Sup. Ct. 412, 416, 4 L. Ed. (2d) 480, 485:

"And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion of the States. *De Jonge v. Oregon*, 299 U. S. 353, 364, 57 S. Ct. 255, 259, 81 L. Ed. 278; *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 460, 78 S. Ct. 1163, 1170, 2 L. Ed. (2d) 1488."

This court held to the same effect in *Lawson v. Housing Authority* (1955), 270 Wis. 269, 274, 70 N. W. (2d) 605.

From this premise the plaintiff argues that the converse is also true, i.e., the right not to belong to an association is also a freedom protected by the Fourteenth amendment. In support thereof he cites the following statement from the opinion of the Maine court in *Pappas v. Stacey*[1] (1955), 151 Me. 36, 116 Atl. (2d) 497, 500: "Freedom to associate of necessity means as well freedom not to associate. . . ."

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[1] In making such statement the Maine court was not referring to rights protected by the Fourteenth amendment, but was interpreting a state statute which provided, "Workers shall have full freedom of association . . ."

However, decisions of serious questions of constitutional law ought not to be grounded upon cliche.

The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings
65 or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year. He is as free as he was before to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar.

The right to practice law is not a right but is a privilege subject to regulation. *Petition for Integration of the Bar of Minnesota* (1943), 216 Minn. 195, 12 N. W. (2d) 515, 518. As the Arizona court well stated in *In re Greer* (1938), 52 Ariz. 385, 81 Pac. (2d) 96, 98:

"The right to practice law is not a natural nor constitutional one, in the sense that the right to engage in the ordinary avocations of life, such as farming, the industrial trades and the mercantile business is. It has always been considered as a privilege only, bestowed upon certain persons primarily for the benefit of society, and upon such terms and conditions as the state may fix. The final determination as to what these conditions are, and who has satisfactorily complied therewith, is, and always has been, in the courts before which the individual practices his profession, and from time immemorial such individuals have been considered essentially and primarily as officers of the court admitting them."

The only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations

adopted do not impose an unconstitutional burden or deny due process. *Schware v. Board of Examiners* (1957), 353 U. S. 232, 77 Sup. Ct. 752, 1 L. Ed. 796.

Mr. Chief Justice ROSENBERRY declared in the *Integration of Bar Case* (1943), *supra*, that the dues payable by a lawyer to an integrated bar imposed by state action are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation. This is also the holding of the Florida and Louisiana courts in *Petition of Florida State Bar Association* (Fla. 1949), 40 So. (2d) 902, and *In re Mundy* (1942), 202 La. 41, 11 So. (2d) 41. The fact that a license fee exact-
66 ed by the courts is not deposited in the public treasury but is disbursed by the court created agency to which paid, does not militate against the validity of such license fee. *Laughlin v. Clephane* (D. C. for Dist. Col. 1947), 77 Fed. Supp. 103.

The plaintiff grounds his argument, that the compulsory dues of the State Bar do impinge upon First amendment freedoms, on the fact that the State Bar does take a stand on legislation pending before the legislature. He points out that he personally is opposed to some of the legislation supported by it. Because of this he contends his rights guaranteed by the First amendment are violated because part of his dues money is used to support causes to which he is opposed.

Whatever activity in the legislative field in which the State Bar does engage is limited by its rules and by-laws promulgated by this court. Two of the standing committees which the board of governors is directed to establish by Rule .4 are the Committee on Administration of Justice and the Committee on Legislation. Secs. 4 and 9 respective-

ly of the by-laws define the duties of these two committees and read as follows:

"Section 4. *Committee on administration of justice.* This committee shall study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.

"Section 9. *Committee on legislation.* This committee shall study all proposals submitted to the Wisconsin Legislature or the Congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals."

This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the legislative measures
67 advocated or opposed have dealt with the administration of justice, court reform, and legal practice. Neither the above-quoted by-laws nor the stated purposes set forth in Rule 2 for which the bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects. The plaintiff complains that certain proposed legislation, upon which the State Bar has taken a stand, embody changes in substantive law, and points to the recently enacted Family Code. Among other things, such measure made many changes in divorce procedure, and, therefore, legal practice. We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal

with legal practice and the administration of justice merely because it also makes some ch. .ges in substantive law.

We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association. Cf. *Petition of Florida State Bar Ass'n., supra.*

The plaintiff contends that the State Bar's legislative activities are the same as those of such voluntary bar associations as the former Wisconsin Bar Association and the American Bar Association. Such argument ignores the obvious and very material distinction that exists between the legislative activities of the State Bar and those of
68 a voluntary association. A voluntary association is free to take a stand on any proposed legislation in any field it deems desirable. This is not true of the State Bar which must confine its activities in legislative matters to those authorized by the rules and by-laws promulgated by this court. Insofar as it confines such activities to those authorized by the rules and by-laws, this court will not interfere or in any manner seek to control or censor the action taken, or to substitute its judgment for that of the membership of the State Bar. This was made crystal clear in our opinion in *In re Integration of the Bar* (1958), 5 Wis. (2d) 618, 625-627, 93 N. W. (2d) 601. Any other course would be abhorrent to our sense of devotion to the ideal of a free

and independent bar. However, as we pointed out in our opinion in the 1958 *In re Integration of the Bar Case*, this court will exercise its inherent power to take remedial action should the State Bar engage in an activity not authorized by the rules and by-laws and not in keeping with the stated objectives for which it was created. If the lawyers of the state wish by group action to engage in legislative activities not so authorized they will have to do so within the framework of some voluntary association, and not the State Bar.

In the recent case of *Dulles v. Johnson* (2d Cir. 1959), 273 Fed. (2d) 362, the court had before it the question of whether bequests to certain New York bar associations were exempt from federal estate tax. While such associations were voluntary in character, their activities in legislative matters seem to have been similar in scope to those of
69 the State Bar of Wisconsin. The commissioner of internal revenue contended that the bequests were subject to tax because the associations were attempting to influence legislation and to carry on propaganda. However, the court ruled that the bequests were exempt and stated (p. 367):

"Moreover, the legislative recommendations of the Associations, insofar as these recommendations do not involve matters the responsibility for which has been entrusted to the Associations by the Legislature, are designed to improve court procedure or to clarify some technical matter of substantive law. They are not intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy. These two factors lead us to the conclusion that the recommendations of the Associations concerning impending legislation are not such as to cause the forfeiture of charitable status under Section 812 (d)."

In other words, the court of appeals for the Second Circuit determined that these restricted legislative activities were in the public interest and did not destroy the exemption.

While the police power is generally considered an exclusive power of the legislature, it may be exercised by courts. *Petition of Florida State Bar Ass'n., supra.* In such cited case the court held that its exercise of inherent power to integrate the Florida bar constituted an exercise of the police power. We deem that the same is true of the 1956 and 1958 orders of this court integrating the bar of this state, and continuing the same, in order to improve the administration of justice. In situations where regulatory measures adopted by the states, or agencies thereof, pursuant to the police power, are attacked as infringing First amendment freedoms, the courts are required to balance the competing public and private interests at stake. *Barenblatt v. United States* (1958), 360 U. S. 109, 126, 79 Sup. Ct. 1081, 3 L. Ed. (2d) 1115; *National Asso. for Advancement of Colored People v. Alabama* (1958), 357 U. S. 449, 463, 466, 78 Sup. Ct. 1163, 2 L. Ed. (2d) 1488; and *Schneider v. Irvington* (1939), 308 U. S. 147, 161, 60 Sup. Ct. 146, 84 L. Ed. 155.

70 When we attempt to balance the competing interests at stake in this action we find no regulation of, or interference with, any of the plaintiff's rights of free speech, assembly, or petition. The only challenged interference with his liberty is the exaction of annual dues to the State Bar, in the nature of the imposition of an annual license fee, not unreasonable or unduly burdensome in amount, part of which is used to advocate causes to which he is opposed. However, this court in which is vested the power of the

state to regulate the practice of law, has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar. The public interest so promoted far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues.

Furthermore, the State Bar is a public and not a private agency. In the annotation entitled, "State bar created by act of legislature or rules of court; integrated bar," 114 A. L. R. 161, the author states:

"While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies."

State Bar v. Superior Court (1929), 207 Cal. 323, 278 Pac. 432, 434, and *In re Gibson* (1931), 35 N. Mex. 540, 4 Pac. (2d) 643, 653, support the above-quoted statement.

In 1951 the Wisconsin legislature created the Judicial Council. Of the present sixteen members thereof, four
71 are chosen by the State Bar as a result of a secret ballot of its active members, three directly for such position, and the fourth ex officio because of having been elected president-elect of the organization. Such judicial council has been expressly authorized by the legislature to recommend to it "changes in the organization, jurisdiction, operation and methods of conducting the business of the courts."

Sec. 251.181 (2) (f), Stats. Thus it advocates adoption of legislation of the same category on which the State Bar voices a position. The council's activities are financed by an appropriation of the legislature and thus is supported out of the state's tax revenues. We are satisfied that the plaintiff as a taxpayer could not successfully challenge the constitutionality of the disbursement of public funds derived from taxes to support the activities of the judicial council merely because he was opposed to certain proposed legislation which it recommended be passed by the legislature. We can perceive no valid basis for distinguishing that situation from the one here confronting us insofar as constitutionality is concerned. The State Bar is a public agency the same as the Judicial Council. One has been created by the court and the other by the legislature but each was created by state action as a state agency to serve a public purpose.

While the plaintiff does not challenge the constitutionality of the purposes, other than legislative, for which the State Bar expends the annual dues collected from its members, we deem it advisable to set forth in an appendix to this opinion an analysis of such activities and the public purpose served thereby. Such analysis is not based upon the allegations of the complaint but upon facts of which this court takes judicial notice.

A considerable portion of plaintiff's brief is devoted to an impassioned argument that the integration of the bar is but the initial step which will lead to fascist syndicalism of the type rampant in Italy during Mussolini's years
72 of power. As plaintiff points out, the chief evils of such a system was that the syndicates usurped and exercised the powers which in a democracy would be exercised

by parliament and the courts, with resulting curtailment of the liberties of the people. That integration will lead to fascist syndicalism is an argument addressed to the policy making functions of the court, which would be material on the issue of whether or not to direct that the bar be integrated, but is hardly pertinent with respect to the issue of constitutionality. It is the constitutional issue alone with which we are here concerned.

Some of the states which have had long years of experience with an integrated bar, and the years in which such integration was accomplished are:

North Dakota	1921
California	1927
South Dakota	1931
Washington	1933
Missouri	1934

If bar integration were to lead to syndicalism one would think that some start in this direction at least would be discernible by now after the lapse of a period in excess of twenty-five years that these five states have had integrated bars. The fact that no such trend has occurred after such long experience with an integrated bar is to us convincing proof of the groundless nature of plaintiff's fears.

Mr. Justice HOLMES, in his famous dissent in *Panhandle Oil Co. v. Knox* (1928), 277 U. S. 218, 223, 48 Sup. Ct. 451, 72 L. Ed. 857, after referring to Chief Justice MARSHALL'S often quoted dictum that the power to tax is the power to destroy, declared, "The power to tax is not the power to destroy while this court sits." This prompts us to observe that any usurpation on the part of the State Bar of the powers of either the legislature or the courts will not occur so long as this court sits. Without such usurpa-

tion of legislative or judicial power there can be no fascist syndicalism.

It is our considered judgment that the orders of this court integrating the bar, and continuing such integration, violate none of the First amendment freedoms of the plaintiff as embodied in the due-process and equal-protection-of-the-laws clauses of the Fourteenth amendment.

While we have considered and resolved the constitutional issue as if this were a proceeding originally brought in this court, our mandate also will affirm the judgment below.

By the Court.—The order of this court of December 7, 1956, which promulgated the rules and by-laws of the State Bar of Wisconsin effective for a two year period, and the further order of this court of December 22, 1958, which continued the State Bar of Wisconsin on a permanent basis, do not violate the Fourteenth amendment to the United States constitution and are constitutional. The judgment appealed from is affirmed.

APPENDIX

74 *Major Activities of State Bar of Wisconsin*

Post-Graduate Education of Lawyers.

The most extensive activities of the State Bar are those directed toward post-graduate education of lawyers. There is a great need for this because of the rapid changes and new developments that have occurred in the field of law subsequent to the admission to practice of a large percentage of the lawyers of the state. This trend shows no signs of abating. In order that lawyers be qualified to properly represent clients such post-graduate education is essential.

The State Bar provides such post-graduate education through its annual and separate mid-winter meetings, its regional meetings, its annual tax school, and its publication of the Wisconsin Bar Bulletin. The annual and the mid-winter meetings of the State Bar are each of at least two days' duration and are largely devoted to the delivery of papers on technical legal subjects of an instructive nature. The same is true of the one-day regional meetings annually held throughout the state. At the annual two-day tax school the papers delivered are confined to the fields of taxation. Many of these papers delivered at these various meetings are later published in the Wisconsin Bar Bulletin so that they will be available for instant reference by all members of the bar of the state. Each member of the State Bar receives a copy of the Wisconsin Bar Bulletin by mail as issued, it being published bi-monthly.

Post-graduate education of lawyers is in the public interest because it promotes the competency of law-
75 yers to handle the legal matters entrusted to them by those of the general public who employ them.

Public Relations.

The field of endeavor carried on under the name of "public relations" would better be termed "public service." The chief activity carried on in this field by the State Bar is the preparation, publication, and distribution to the general public of pamphlets dealing with various transactions and happenings with which laymen are frequently confronted, which embody legal problems. Alternative courses of action are sometimes set forth and the advantages and disadvantages of each explained. Where there is danger that a layman might be likely to overlook some positive requirement of the law, such requirements are pointed out. Among the titles of such pamphlets are: "It May be Your Turn Next—What to do in Case of an Auto Accident;" "Have You Made a Will;" "Sound Steps in Purchasing a Home;" and "Joint Tenancy—Boon or Boomerang." Banks and trust companies, local bar associations, and others purchase these pamphlets from the State Bar at slight advance above the cost of publication in order to cover boxing and mailing expense. The statement of receipts and disbursements of the State Bar for the calendar year of 1959 shows receipts of $2,748.27 from the sale of pamphlets which receipts should be credited against a total expenditure for "Public Relations" of $2,743.55.

Another activity of the State Bar in this field consists of preparation of informative articles on legal subjects which are offered for publication to the newspapers throughout the state, and are published under the heading of "The Law and You."

76 A further public relations activity is the preparation and distribution of news releases covering the ac-

tivities of the State Bar, such, for example, as the observance throughout the state of "Law Day, U. S. A."

Discouraging Unauthorized Practice of the Law.

One of the standing committees of the State Bar is that of Unauthorized Practice of Law. The primary purpose of such committee is to protect the public from incompetent layment attempting to offer or perform legal services which they are not competent to render. This is a constant program since numerous trades and occupations keep expanding their services and frequently start offering services which constitute the practice of the law. As a result of integration the income from dues has enabled the State Bar to employ an additional lawyer on its staff whose major assignment is to investigate complaints made with respect to instances of unauthorized practice of the law, and to cause any unauthorized practices so discovered to be discontinued through persuasion or legal action.

Establishment of a Minimum Fee Schedule.

The State Bar recently adopted a recommended minimum fee schedule covering legal services. The present economic plight of the lawyers in this country is one which has disturbed the bench and the bar. Able young men who otherwise might be attracted to entering the legal profession are being discouraged not to because of this. Lawyers already in the profession because of insufficient incomes are caused to forsake the practice of law for more financially attractive fields of endeavor. According to statistics gathered by the Economics of Law Practice Committee of the American Bar Association during the period of 1929 to 1951

the net income of lawyers increased but 58 per cent, while for the same period that of dentists rose 83 per cent
77 and that of physicians 157 per cent. During the same period the net income of employees of all industry increased 131 per cent. During 1954 the net income before taxes of one-third of all practicing lawyers of the nation was less than $5,485.

The quality of legal service which will be rendered to the public is likely to suffer if young men of ability are dissuaded from entering the profession because of the difficulty of securing an adequate financial reward to enable them to properly support themselves and their families. A minimum fee schedule which realistically recommends charges for legal services that are in keeping with the increased cost of living that has taken place since World War II, should have a tendency toward remedying this condition. Such a schedule also serves a further public purpose because it provides a guide for the basing of legal charges that tends to prevent overcharges as well as undercharges. Lawyers, who are true to their oath of admission, recognize that adoption of a recommended minimum fee schedule does not relieve them from the duty of serving the poor without compensation, or of reducing the charge if the normal charge would be unduly burdensome to a client of limited means. Furthermore, a lawyer's charge for services, even when based upon the recommended schedule, is always subject to the court's determination of reasonableness.

Legal Aid.

Another of the standing committees of the State Bar is the Legal Aid Committee. This committee has done effective and noteworthy work to encourage the local bar associations of the state to set up legal aid systems in their local communities under which legal services are rendered without charge to the indigent in the need of the same. Such committee has also outlined recommended procedures for establishing and carrying through such systems of providing legal aid.

78 *Investigation and Adjustment of Grievances.*

The State Bar has created grievance committees for each of the nine districts into which the state has been divided for election purposes. These districts coincide with the Congressional districts of the state except for combining the two Congressional districts of Milwaukee county into one district. While the supreme court has delegated none of its power to punish disciplinary infractions, these State Bar grievance committees perform a valuable function in investigating and adjusting grievances filed against lawyers of the district in which the particular grievance committee functions. Prior to integration of the bar most of such grievances were investigated by the paid counsel of the Board of State Bar Commissioners, and the cost thereof was defrayed from the general tax revenues of the state. Since integration most of such work of investigation of grievances has been done by the grievance committees of the State Bar. As a result there has been a saving to the general taxpayers of the state. One evidence of this is that the Board of State Bar Commissioners is requesting a de-

crease in its appropriation from the state of $800 less for the coming biennium than was appropriated in the present biennium.

Legislative Activities.

In addition to the legislative activities of the State Bar to which the plaintiff objected, and which are discussed in the opinion, the State Bar performs the further function of promptly publicizing to the lawyers of the state pending and adopted legislation affecting legal practice.

Acts lengthy in scope, such as the Family Code and the
79 Act Extending the Jurisdiction of the Courts Over Non-Resident Persons and Corporations, are analyzed and explained by articles published in the Wisconsin Bar Bulletin. Such activities enable the lawyers to better serve their clients.

58 JUDGMENT OF SUPREME COURT OF WISCONSIN ENTERED APRIL 5, 1960

(Formal parts omitted)

58 This cause came on to be heard on appeal from the judgment of the Circuit Court of Fond du Lac County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of this Court of December 7, 1956, which promulgated the rules and by-laws of the State Bar of Wisconsin effective for a two year period, and the further order of this Court of December 22, 1958, which continued the State Bar of Wisconsin on a permanent basis, do not violate the Fourteenth amendment to the United States

constitution and are constitutional. The judgment of the Circuit Court of Fond du Lac County, appealed from in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of One Hundred Twenty-five Dollars and No Cents ($125.00).

Justice Hallows took no part.

39-51 OPINION OF RUSSELL E. HANSON
JUDGE OF CIRCUIT COURT FOR
FOND DU LAC COUNTY, WISCONSIN
DATED OCTOBER 23, 1959
(Formal parts omitted).

39 Briefly, the complaint of the plaintiff alleges that he is duly licensed by the State of Wisconsin to practice law as a lawyer and that he has been so engaged since 1948. That on March 6, 1959, he paid to the defendant, by certified check payable to the order of the defendant, the sum of $15.00; and that at the time of the delivery of the check he informed the defendant, in a letter which accompanied the check, that the check was sent under compulsion of Sections 2 and 3 of Article 1 of the By-laws of the State Bar of Wisconsin, and under protest, and that he would hold the defendant personally liable for that amount. A copy of the letter is attached to the complaint. That the defendant cashed the check and commingled the $15.00 with the funds of the State Bar of Wisconsin, the defendant being at that time Treasurer of the State Bar of Wisconsin. That the sum of $15.00 constituted dues which the plaintiff was required to pay to the State Bar of Wisconsin annually in order to be permitted to practice law, and that

said payment was made under coercion and against his free will.

The complaint further alleges that the State Bar of Wisconsin has used its employees, property and funds in active unsolicited opposition to the adoption of legislation by the Legislature of Wisconsin which was favored by the plaintiff.

The complaint further alleges that the State Bar of Wisconsin has also been engaged in the promotion of matters contrary to its fundamental purposes. The last paragraph of the complaint reads as follows:

40 "The plaintiff bases this action on his chaim that the defendant has unjustly received, held, and disposed of funds of the plaintiff in the amount of $15.00, which to the knowledge of the defendant were paid to the defendant by the plaintiff unwillingly and under coercion, and that such coercion was and is entailed in the rules and by-laws of the State Bar of Wisconsin continued in effect by the aforesaid order of the Supreme Court of Wisconsin dated December 22, 1958; and the said order, insofar as it coerces the plaintiff to support the State Bar of Wisconsin is unconstitutional and in violation of the Fourteen. Amendment of the Constitution of the United States, and Sections 1, 3, 4, 18 and 22 of Article 1 of the Constitution of the State of Wisconsin."

The addendum clause then prays for judgment against the defendant in the amount of $15.00, plus interest from March 31, 1959, together with his costs and disbursements; and that the plaintiff have such other relief as may be just.

The defendant demurs to the complaint on the ground that it appears on the face thereof that:

1. The Court lacks jurisdiction over the subject matter of the action in that exclusive jurisdiction thereof is vested in the Supreme Court of the State of Wisconsin.

2. There is a defect of parties defendant in that the State Bar of Wisconsin is a necessary party.

3. The complaint does not state facts sufficient to constitute a cause of action.

It is not clear from the complaint as to whether the plaintiff is basing his claim for the refund of the $15.00 dues paid to the State Bar of Wisconsin by virtue of the fact that he alleges that said payment was made under coercion as a result of his contention that the State Bar was engaged in activities contrary to the rules of the Supreme Court, or whether it is limited to a rule which provides that a lawyer must pay annual dues of $15.00 in order to be properly licensed to practice law in the State of Wisconsin. For the purpose of ruling on the demurrer, the complaint must be liberally construed; and for that reason the Court is
41 construing the complaint to mean that the plaintiff seeks a refund of the sum of $15.00 he paid as dues under a contention that he was coerced into paying said dues by the State Bar of Wisconsin while the State of Wisconsin was engaged in the performance of functions contrary to the rules and regulations as promulgated by the Supreme Court of Wisconsin; and that he was likewise coerced into paying the $15.00 dues by virtue of a rule promulgated by the Supreme Court of Wisconsin which provides that, in order to practice law in the State of Wisconsin, annual dues in the sum of $15.00 must be paid to the State Bar of Wisconsin; and that as a result the rules so promulgated by the Supreme Court of Wisconsin in "In re: Integration of Bar, 273 Wis. 281," and State Bar rules and State Bar by-laws

set forth in 273 Wis. xi through xxxvii, or certain of the provisions therein, are null and void as being in violation of constitutional provisions of either the State of Wisconsin or the United States of America. (The Supreme Court of Wisconsin in "In re: Integration of Bar, 5 Wis. (2d) 618," on Dec. 22, 1958, order as follows: "It is ordered that the State Bar of Wisconsin be and it is hereby continued." By ordering the continuation of the State Bar of Wisconsin, the Supreme Court ordered that the State Bar rules and the State Bar by-laws (supra) be continued in effect indefinitely.)

Section 256.31 of the Statutes was adopted by the Legislature in the year 1943, being known as Chapter 315 of the Laws of 1943, and reads as follows:

> "State bar of Wisconsin. (1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.
>
> "(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations
> 42 and conditions of membership therein to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

In Integration of Bar Case: In re Constitutionality of Chapter 315 Laws of 1943, 244 Wis. 8, the Court held as follows:

"Ch. 315, Laws of 1943, creating sec. 256.31, Stats., directing the supreme court to provide by appropriate orders for the organization and government of a state bar association, and providing that all persons licensed to practice law shall be members as a condition precedent to the right to practice law in this state, is not unconstitutional as delegating legislative power to the court, nor as denying to members of the bar the equal protection of the laws guaranteed by the Fourteenth amendment, nor as denying to them the benefit of federal statutes relating to the practice of law in the federal courts.

"The integration of the bar is a judicial and not a legislative function, and the power to integrate the bar resides in the judicial and not in the legislative branch of the state government. The supreme court is not precluded from exercising the power of integrating the bar by the provision in sec. 3, art. VII, Const., conferring only appellate jurisdiction on that court.

"So far as the integration of the bar involves matters affecting the general welfare, the legislature in the exercise of its powers may act subject to review by the court to determine whether the administration of justice is embarrassed or the constitutional power of the court is invaded.

"The court will not treat ch. 315, Laws of 1943, as merely a memorial invoking the power of the court to integrate the bar, nor will the court regard the act as an attempt by the legislature to invade the province of the court or to dictate to it, but the court will regard the act as a legislative declaration that the integration of the bar will promote the general welfare.

"In view of the fact that so many members of the bar are in the military and naval service or otherwise engaged in promting the war effort, the matter of in-

tegration will not be proceeded with at the present time."

In In re Integration of the Bar, 249 Wis. 523, the Court held as follows:

"The justification for integrating the bar and compelling the payment of fees, which are the lifeblood of an integrated bar, would be that the supreme court has inherent power to control and regulate its bar as officers of the court, and that this power may be implemented by dues from the members of the bar which serve in a measure the function of license fees, but which are not such in a legal sense, in that they are not paid into the treasury of the state.

43 "In case of integration of the bar by the supreme court pursuant to ch. 315, Laws of 1943, sec. 256.31, Stats., annual fees required by the members of the bar in support of the integrated bar would be moneys required to be paid into the treasury of the bar for a public purpose connected with the administration of justice."

On Page 527 the Court said:

"In the original opinion we expressly reserved the question whether this court could require members of the bar to pay dues in support of an integrated bar. A consideration of this question is necessarily inseparable from a consideration of the question whether the court should integrate the bar, because the fees are the lifeblood of the integrated bar, and to integrate the bar without fees would be useless. Such cases as we have examined, passing upon his point, hold that the court may require payment of dues. A. C. Brydonjack v. State Bar of California, 208 Cal. 439, 281 Pac. 1018, 66 A. L. R. 1507; In re Gibson, 35 N. M. 550, 4 Pac.

(2d) 643; State Bar of Oklahoma v. McGhee, 148 Okla. 219, 298 Pac. 580; Kelley v. State Bar of Oklahoma, 148 Okla. 282, 298 Pac. 623; Petition for Integration of Bar of Minnesota, 216 Minn. 195, 12 N. W. (2d) 515; In re Scott, 53 Nev. 24, 292 Pac. 291. All of them very briefly justify the fees as an occupational license. This analogy cannot be pressed too far, although it has some vitality, because the license of occupations is clearly a legislative function. Further than this, license money should properly go into the treasury of the state and be appropriated. It must be appropriated for a public purpose, it requires a strict limiting of purposes of the integrated bar, and it raises embarrassing problems of auditing.

"The justification for integrating the bar and compelling payment of fees is not that suggested by the cases above cited. It is rather that the court has inherent power to control and regulate its bar as officers of the court, and that this power may be implemented by dues from the members which serve in a measure the function of license fees, but which are not such in a legal sense. In other words, the court by reason of its inherent or implied powers may, if it thinks the exigencies call for it, require the bar to act as a unit, to promote high standards of practice and the economical and speedy enforcement of legal rights, and to implement this may require the bar to make such contributions in money to the joint effort as is deemed necessary and proper. No matter what these fees be called, they are moneys required to be paid into the treasury of the bar for a public purpose connected with the administration of justice."

In In Re Integration of the Bar, 273 Wis. 281, on Page 283 the Court held as follows:

"This is the third time that this matter has received the attention of this court. See Integration of Bar Case, 244 Wis. 8, 11 N. W. (2d) 604, 12 N .W. (2d) 44 699, and in re Integration of Bar, 249 Wis. 523, 25 N. W. (2d) 500. In those decisions legal and constitutional questions involving the enactment of ch. 315, Laws of 1943, now sec. 256.31, Stats., were considered and answered. It was held that said statutory provision is not binding upon the court but was an expression of public policy by the legislature. It was held that this court, by reason of its inherent powers, may require the bar to act as a unit to promote high standards of practice and the economical and speedy enforcement of legal rights.

"In the first decision it was held that the bar should not be integrated while so many attorneys were engaged in the war effort. In the second decision it was intimated that the objectives sought to be obtained by integration could be attained by an adequately supported voluntary association, and the court advocated complete and wholehearted support of the voluntary association by the individual members of the bar. Many individual members of the bar did respond to that suggestion, but it is now reported that too many lawyers have refrained or refused to join, that membership in the voluntary association has become static, and that a substantial minority of the lawyers in the state are not associated with the State Bar Association.

"Able attorneys presented arguments both for and against the granting of the petition. Apparently the same arguments have been made in other states. 114 A. L. R. 151; 151 A. L. R. 586; and Petition of Florida

State Bar Asso. 40 So. (2d) 902. It is unnecessary to repeat the arguments here.

"Twenty-four states now have integrated bars. Some have been integrated in response to legislation such as we have in this state and some under the inherent power of the high courts of the various states."

The Supreme Court then ordered the State Bar of Wisconsin to be integrated when proper rules and procedures had been adopted by further order of the Court. It was as a result of this order that the Supreme Court promulgated the State Bar Rules and the State Bar By-laws (supra), the Court having ordered that these rules and by-laws be in effect for a period of two years.

In In Re Integration of the Bar, December 22, 1958, 5 Wis. (2d) 618, the Court said, at Page 620:

"The history of integration is adequately set forth in the previous decisions of this court. Integration of Bar Case (1943), 244 Wis. 8, 11 N. W. (2d) 604; In re Integration of Bar (1946), 249 Wis. 523, 25 N. W. (2d) 500; In re Integration of Bar (1956), 273 Wis. 281, 45 77 N. W. (2d) 602. The present rules and by-laws of the State Bar of Wisconsin were adopted and promulgated and the bar integrated by order of this court on December 7, 1956, to be effective for two years commencing January 1, 1957, subject to amendment as provided in the rules and by-laws or at any time by order of this court. See Integration of the Bar (1956) 273 Wis. p. vii. (Order, Opinion, State Bar Rules, and State Bar By-laws)."

The Court further said, on Pages 622-623:

"We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper

and efficient administration of justice. Members of the legal profession by their admission to the bar become an important part of that process and this relationship is characterized by the statement that members of the bar are officers of the court. An independent, active, and intelligent bar is necessary to the efficient administration of justice by the courts. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the bar. The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this court should continue to exercise its supervisory control of the practice of the law.

"The integration of the bar is no more undemocratic than the requirement of learning and good moral character of all who seek the privilege of practicing law. All members had the same opportunity and have freely chosen a profession subject traditionally to discipline and control by the courts. It is not undemocratic to require those who are privileged to practice law and are intrusted with the duty to secure or protect the property, rights, and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group, and to increase the effectiveness of their service to the public. The integrated bar has been defined as 'the process by which every member of the bar is given an opportunity to do his share in carrying out the public service of the bar and obliged to bear his portion of the responsibility.' Most objections have centered around the obligation to bear a portion of the responsibility. In the nature of things every privilege has a correlative obligation.

"The integrated bar does not destroy either the independence of the bar or of the individual lawyers. The State Bar of Wisconsin was not intended to control and there is no evidence or intimation that it has controlled or attempted to control the thinking of any of its members. When the State Bar of Wisconsin through its board of governors, an elected representative policy-making body, duly decides a policy within its province on behalf of the State Bar everyone understands or should understand the policy is that of the State Bar as an entity separate and distinct from each
46 individual. Such pronouncement of the State Bar does not necessarily mean all of its members agree with that pronouncement, nor is it necessary for them to do so. Individual members are free to think and to express their own opinions. But it is the nature of a representative democratic organization that the elected representatives of the group speak and act for it in accordance with its organic laws.

"The rules of the State Bar of Wisconsin are rules promulgated by this court."

The Court further said, on Pages 624-625:

"The other rules deal with the conditions of membership, the officers, the board of directors, and the executive committee. Democratic procedure is provided for membership meetings and for membership referendum. Rule 10 provides for grievance committees and procedures for the investigation of grievances, for the protection of the members of the bar, and for the protection of the public. The integrated bar has no power to discipline or to bisbar any member. That power has been reserved to and not delegated by this court. The procedure under sec. 256.28, Stats., for filing complaints for discipline or disbarment in this court is unaffected by these rules. Rule 11 and Rule 7 pro-

vide an orderly and easy method by which proposals to amend or abrogate the rules of the State Bar may be brought before this court for hearing on petition. Rule 9 provides the rules of professional conduct set forth from time to time in the canons of professional ethics of the American Bar Association, as supplemented or modified by pronouncement of this court, shall be the standard governing the practice of law in this state. Prior to the adoption of the rules this court had not expressly adopted such Canons of Professional Ethics in toto.

"The by-laws of the State Bar provide for the internal workings of the organization and by Rule 11, sec. 2, may be amended or abrogated by resolution adopted by a vote of two thirds of the members of the board of governors or by the members of the association themselves through the referendum procedure. As a further protection to the minority a petition for review of any change in the by-laws made by the board of governors will be entertained by the court if signed by 25 or more active members.

"Independently of the provisions in the rules for invoking our supervisory jurisdiction, this court has inherent power to take remedial action, on a sufficient showing that the activities or policies of the State Bar are not in harmony with the objectives for which integration was ordered or are otherwise contrary to the public interest."

A rule promulgated by the Supreme Court of Wisconsin is as effective as a law passed by the Legislature, and in effect is a law of the State. The Supreme Court has exclusive supervisory jurisdiction of the State Bar of Wisconsin. If the rules as now promulgated are such that they permit the State Bar of Wisconsin to engage in ac-

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tivities which are not in agreement with the views of the plaintiff, the plaintiff may seek a remedy by following the remedial provisions as contained in the rules, and the Supreme Court of Wisconsin has exclusive jurisdiction to determine whether or not the State Bar of Wisconsin is violating the rules or whether the rules should be amended. The Circuit Court has no jurisdiction to determine these questions.

Section 5 of Rule 2 of the State Bar Rules provides that every active member shall pay membership dues in such amount, not exceeding $20.00 per year, as may be fixed in the By-laws. Section 3 of the State Bar By-laws provides that a member shall be suspended for non-payment of dues. It also provides that no person whose membership is suspended for the non-payment of dues shall be entitled to practice law during the period of such suspension. By rule of the Supreme Court of Wisconsin it is the declared law of this State that in the event a lawyer fails to pay the dues as provided by law, he may be suspended and, as a result of being suspended, is not permitted to practice law in this State. The rules further provide for a method of petitioning the Supreme Court of Wisconsin requesting that the rule be changed. The Circuit Court has no jurisdiction with reference to the rules herein involved. The plaintiff contends that the Circuit Court has jurisdiction by virtue of the fact that this is a suit for the collection of money. However, the subject matter of this litigation involves rules promulgated by the Supreme Court of Wisconsin, and the Supreme Court has exclusive jurisdiction with reference to the questions involved.

48 It is therefore the considered opinion of this Court that the Supreme Court of Wisconsin has exclusive

jurisdiction of the subject matter contained in the complaint of the plaintiff.

Assuming that this Court did have jurisdiction of the subject matter of the complaint, then is there a defect of parties defendant in that the State Bar of Wisconsin is a necessary party? The defendant Donohue is a practicing attorney and, at the time of the service of the complaint on June 8, 1959, was treasurer of the State Bar of Wisconsin. This Court takes judicial note of the rules of the State Bar of Wisconsin which provide for the election of officers and, by virtue of these rules, recognizes that the defendant is no longer treasurer of the State Bar. The Court also takes judicial note of the rules which provide that all funds must be disbursed in accordance with the orders of the Board of Governors of the Bar. The complaint recognizes that the sum of $15.00 paid to the defendant was turned over and went into the treasury of the State Bar and that the real owner of the funds is the State Bar. Rule 1 of the State Bar Rules provides:

> "The State Bar may, for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and dispose of real and personal property."

If the plaintiff can recover from the defendant on the ground that the State Bar Rules are invalid, as alleged, then the rights of the State Bar and its various assistants are in jeopardy in a lawsuit to which it is not a party. In indispensable party to a lawsuit can be defined as follows:

> "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other

parties to the suit without radically and injuriously affecting his interest or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

Silver King Coalition Mines Co. vs. Silver King C. M. Co., 204 Fed. 166, quoted with approval in McCoy vs. May, 255 Wis. 20.

49 It is the opinion of this Court that the State Bar of Wisconsin is an indispensable party to this litigation and that its interest in the subject matter of the controversy is such as that is should be required, for its own protection, to be brought in as a party defendant. (Section 260.19 (1) Wisconsin Statutes.)

Assuming that this Court did have jurisdiction of the subject matter of the complaint, then does the complaint state facts sufficient to constitute a cause of action? It is the contention of the plaintiff that the rules under which the State Bar operates, and particularly the rule requiring a lawyer to pay annual dues of $15.00, violate the provisions of the Constitution of Wisconsin and also the provisions of the Constitution of the United States.

Independently of the rules which create and govern the State Bar, the Supreme Court has exclusive supervisory jurisdiction over the State Bar by virtue of its inherent power to take remedial action on a sufficient showing that the activities or policies of the State Bar are not in harmony with the objectives for which integration was ordered, or are otherwise contrary to the public interest. The Circuit Court has no such jurisdiction.

The power and authority to grant a permit to an individual, authorizing the individual to practice law, rests

exclusively in the Supreme Court. The power to control the activities of the lawyers and supervise, reprimand, suspend or disbar a lawyer likewise rests exclusively in the Supreme Court. The Supreme Court, in creating the Integrated Bar, (State Bar of Wisconsin) did not relinquish those rights or powers. The Supreme Court also retained the right and power to supervise, regulate and control the Integrated Bar (State Bar of Wisconsin).

If, when a person is granted permission to pracitce law,
50 he gets that permission as a matter of right, then a serious question would arise as to whether he could be required to pay annual dues in order to be in good standing. It is the considered judgment of this Court that no individual can demand a permit to practice law as a matter of right. In securing permission to practice law, an individual secures the permission by virtue of a privilege. A privilege is not a right. If it is a requirement that the individual pay annual dues in order that the individual may continue to exercise the privilege of practicing law, he is not being deprived of any right under either the Constitution of the State of Wisconsin or under the Constitution of the United States.

The Supreme Court has dealt with the question of the Integrated Bar on at least four occasions, (decisions supra) not only by its decisions but by its acts in ordering the integration of the Bar. (In so doing, creating the State Bar of Wisconsin). Under the rules of the Supreme Court it has effectually declared that all of its rules and regulations are of such a nature that they do not violate any of the provisions of either the Constitution of the State of Wisconsin or of the Constitution of the United States.

This Court concludes that the rules and regulations of the State Bar of Wisconsin, which have been promulgated

by the Supreme Court of Wisconsin, do not violate any of the provisions of the Constitution of the State of Wisconsin or of the Constitution of the United States.

It is unnecesary to treat with the question of whether or not the payment by the plaintiff is to be considered as a payment under protest, or a voluntary payment.

Due consideration has also been given to various other contentions raised by the respective parties, and it is considered that it is unnecessary to discuss them in order to reach a decision.

51 In 5 Wis. (2d) 618 (December 22, 1958) the Court said:

> "* * * It is not undemocratic to require those who are privileged to practice law and are intrusted with the duty to secure to protect the property, rights, and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group, and to increase the effectiveness of their service to the public. The integrated bar has been defined as 'the process by which every member of the bar is given an opportunity to do his share in carrying out the public service of the bar and obliged to bear his portion of the responsibility.' * * * *."

It is therefore concluded that the complaint fails to state facts sufficient to constitute a cause of action.

Assuming that this Court did have jurisdiction over the subject matter of the complaint, and assuming that the State Bar of Wisconsin was made an additional party defendant, it would then be the considered judgment of this Court that it would be impossible to frame a complaint so as to state facts sufficient to constitute a cause of action

against either the State Bar of Wisconsin or the defendant Donohue (in the Circuit Court).

In Pedrick vs. First National Bank of Ripon, 267 Wis. 436, it is held:

> "Where it appears that a sufficient complaint cannot be framed, the trial court, on sustaining a demurrer, may in its discretion deny to the plaintiff the opportunity to plead over."

It follows that the demurrer of the defendant must be sustained; and that the Court should exercise its discretion and deny to the plaintiff the right to plead over.

Counsel for the defendant is hereby directed to prepare for the Court's signature an order sustaining the demurrer of the defendant, dismissing the complaint of the plaintiff, and denying the plaintiff the right to plead over. The order shall further provide that the defendant recover from the plaintiff the sum of $15.00 costs.

54-55 JUDGMENT OF THE CIRCUIT COURT
FOR FOND DU LAC COUNTY, WISCONSIN
ENTERED OCTOBER 23, 1959
(Formal parts omitted)

54 This action having come on for hearing before the Court on September 3, 1959 upon the demurrer of the defendant to the complaint of the plaintiff herein; and the Court having on October 9, 1959 rendered its decision and written opinion upon said demurrer; and the Court having, by an order made and entered on October 23, 1959, sustained said demurrer, denied leave to the plaintiff to plead over, and directed judgment to be entered dismissing the

plaintiff's complaint upon its merits with costs of Fifteen ($15.00) Dollars for the defendant;

NOW, THEREFORE, upon motion of Gordon Sinykin of counsel for the defendant,

IT IS ORDERED AND ADJUDGED that the complaint of the plaintiff herein be and the same hereby is dismissed upon its merits, and that the defendant, Joseph D. Donohue, have and recover from the plaintiff, Trayton L. Lathrop, costs in the sum of Fifteen ($15.00) Dollars.

VETO MESSAGE OF ACTING GOVERNOR WALTER S. GOODLAND

April 16, 1943

To the Honorable, the Senate:

I return herewith Bill No. 56, S. without any approval.

This bill proposes the creation of an association to be known as the "State Bar of Wisconsin" composed of persons licensed to practice law in this state, and expressly provides that membership in such association shall be a condition precedent to the right to practice law in Wisconsin.

The proposal of compulsory membership in any organization is contrary to Wisconsin legislative tradition. It is opposed to our conception of democracy and individual initiative. If enacted into law, this measure would establish a precedent that would offer opportunity for future encroachment. It would encourage similar legislation as to compulsory membership in other professional, business and trade associations.

I believe thoroughly and wholeheartedly in cooperation, but not in coercion, in conducting human affairs and

relations. This bill is founded on force and compulsion and creates a monopoly. I am convinced that the people of this state still believe in the honored tradition and principle of self-determination. This bill forbids that. It is a step farther toward regimentation of the people.

Wisconsin courts have a high reputation in the administration of justice. The Wisconsin bar ranks among the best in the country.

I cannot see the need nor desirability of this arbitrary measure, particularly in these times of emergency when a great number of young lawyers affected thereby are in the armed forces of the United States fighting to preserve the principles of democracy which this bill would restrict. It seems to me that the least we can and should do is to postpone legislation of this character until these young men return and are given an opportunity to express themselves on it.

From its very inception, the legal profession has been recognized as semi-public servants of the people. It is the first line of defense in the guarding and protection of human rights and liberties. Its training in and knowledge of the laws and constitution and the details and operation of government, pre-eminently qualify it as the protector and defender of human rights. It should be constantly on guard to oppose, at its very inception, the slightest attempt to encroach on the fundamental of human rights and liberties. In this instance that duty seems to have been forgotten or ignored,—for what reason, it is not my province to determine.

The liberties we enjoy were only acquired after centuries of struggle. The liberal nations of the world are now engaged in a death struggle for their protection. I would be false to my ideals were I to approve of bill No. 56, S,

with its denials of individual freedom of action. If this were eliminated, I would very gladly sign it.

Respectfully submitted,

WALTER S. GOODLAND /s/
Acting Governor

RESOLUTION ADOPTED BY THE BOARD OF GOVERNORS OF THE STATE BAR OF WISCONSIN ON JUNE 12, 1957

Minutes of Meeting of Board of Governors, State Bar of Wisconsin, Lake Lawn Lodge, Delavan, June 12, 1957, 2:00 p. m.

* * *

Mr. LaFrance presented his recommendations concerning the adoption of Rules of Policy and Procedure Concerning Legislation.

Mr. LaFrance moved the adoption of the Policy and Procedure, as follows:

RECOMMENDED STATE BAR POLICY AND PROCEDURE CONCERNING LEGISLATION

Pursuant to Rule 1, Section 2, of the State Bar Rules, it is undoubtedly incumbent upon the State Bar of Wisconsin to promote advancements in the science of jurisprudence and improvements in the administration of justice. This duty, among other things, obviously requires the State Bar to sponsor, from time to time, needed legislation that is germaine to the functions and purposes of the

State Bar of Wisconsin. Public interest requires that all such recommendations shall have been preceded by careful study and full consideration of the problems sought to be remedied.

These same principles, to the extent possible, apply to all recommendations for or against the enactment of legislation advocated by legislators or by interested groups or by individuals. It is most important that the confidence of the Legislature and of the public be developed and maintained in connection with any recommendations made by the State Bar of Wisconsin concerning legislation.

To the end that a practicable and workable plan may be adopted, the following recommendations are made for the consideration of the Board of Governors:

1. The State Bar, through action of its Board of Governors, will initiate legislation only on such matters as it believes to be of general professional interest. No legislation will be sponsored unless and until the Board is satisfied that the recommendation represents the consensus and the best composite judgment of the legal profession of this state, and that the proposed legislation is meritorious and in the public interest. The text of all proposed legislation shall be carefully prepared and considered and the counsel of the experts in the field involved will be sought wherever possible.

2. The determination of policy as to whether to support or oppose any specific legislation shall be made by the Board of Governors. Such opposition or support shall be expressed as the position of the Board of Governors.

3. Where it is obvious that the membership of the Bar is of a substantially divided opinion, the Board of Governors shall take no definite position; but in any case, the

Board may direct that its vote on any measure be reported to the Legislature as indicative of the diverse views of the members of the Board.

4. The Board of Governors may delegate its prerogative to take a position on legislative matters, where the opinion of the Bar is substantially in accord, to the Committee on Legislation, to the President of the State Bar or to the legislative counsel of the State Bar.

5. The Executive Committee may exercise all the powers and perform all the duties of the Board, between the meetings of the Board concerning matters of legislation, unless otherwise ordered by the Board of Governors.

6. The Board of Governors shall designate a legislative counsel, who shall be registered as a lobbyist for the State Bar of Wisconsin, as required by law. The legislative counsel, under the direction of the Board, or the Executive Committee, shall be responsible for the management and administration of the legislative activities of the State Bar. He shall assist in coordinating the legislative work of the several sections and committees with that of the Board of Governors, the Executive Committee and the Legislative Committee. In connection therewith, the legislative counsel, with the consent of the President, shall have the power and right to enter into modifications which appear to be proper. The legislative counsel, with the assistance of the respective committee and section chairmen, shall screen all legislative proposals. Those proposals deemed of special interest or concern to the members of the State Bar shall be propmptly referred to the appropriate section or committee for special study and for recommendation to the Board of Governors. Where prompt action is required, mail

or telephone polls of the officers or the Executive Committee or the committees shall be permissible.

7. The Committee on State Legislation shall, upon request from the Board of Governors, the Executive Committee, the President or the legislative counsel, designate the persons who shall appear on or explain the proposals before the appropriate legislative committee, and arrange for such appearance.

8. Where any section or committee sponsors legislation, which is approved by the Board of Governors, the section officers or the committee chairman may make appearances before the Legislature on behalf of such measures in the name of the section or committee, or request the legislative counsel to so appear.

9. During the session of the Legislature all sections and committees of the State Bar are expected to stand ready to: (a) Participate in explaining the bills recommended or opposed by the State Bar to the committees of the Legislature to whom they are referred; (b) Prepare explanatory material relative to any bill about which a question has arisen since its introduction; (c) Examine all bills advocated by others that would affect the courts, the judiciary, the legal profession, or the administration of justice in any particular, or that would make any changes in the substantive law, and keep the Board of Governors and the Executive Committee fully informed so that ill-advised bills can be opposed and meritorious bills can be supported. Committees of the Legislature should be encouraged to request the State Bar to study and to report its recommendations concerning all bills of this category.

10. The staff of the State Bar will cooperate with all sections, all committees, with individual members and with

local bar associations desiring to have bills drafted for introduction by their request.

11. In order to facilitate a wide-spread study of legislative proposals and developments, the State Bar shall issue a weekly legislative bulletin to its officers, to the members of the Board of Governors, to the Executive Committee, to section and committee chairmen, to the presidents and secretaries of all local bar associations, to judges, and to such other persons as the Executive Committee shall direct.

12. Local bar associations are encouraged to take such action, concerning proposed legislation, as they may deem indicated and to transmit their decision to the members of the Board of Governors in their respective districts and to the officers and the members of the Executive Committee to the end that their recommendations be given prompt consideration.

The motion carried.

STATEMENT OF RECEIPTS AND DISBURSEMENTS OF STATE BAR OF WISCONSIN FOR THE YEAR 1959

(Vol. 32, Wis. Bar Bull., No. 2, p. 28, April 1960)

STATE BAR OF WISCONSIN

Madison, Wisconsin

CASH RECEIPTS AND DISBURSEMENTS

January 1, 1959 to December 31, 1959

Cash in Bank, January 1, 1959		$ 5,013.92
Receipts		
Dues	$ 81,130.00	
Advertising	6,914.76	
Subscription	343.75	
Sale of Leaflets	2,748.27	
Supreme Court Calendar Service	734.00	
Institutes	1,290.25	
Interest	1,361.01	
Miscellaneous	738.08	
U. S. Treasury Bills, Matured	128,860.65	
Gross Receipts		$224,120.77
Receipts plus Opening Cash		$229,134.69
Disbursements		
Salaries	$ 35,571.42	
Quarters	4,475.27	
Bar Bulletin	10,341.48	
Postage	3,500.00	
Stationery and Paper	1,325.66	
President's Expense	1,446.23	
Board and Officers Expense	1,906.56	

Travel, Executive Secretary	1,151.27	
Travel, Special Investigator	577.84	
Convention Expense	1,184.25	
Midwinter Meeting	1,699.21	
Institutes	517.98	
Regional Meetings	277.20	
Public Relations	2,743,55	
Committee and Sections	1,138.74	
Office Operations	6,867.23	
Social Security	638.31	
Tax Account Reserve (Home Savings & Loan)	3,300.00	
Depreciation Reserve (U. S. Treasury Note)	5,000.00	
U. S. Treasury Bills, Purchased	118,899.05	
Deposited in Anchor Savings & Loan	7,500.00	
Deposited in Provident Savings & Loan	7,500.00	
Total Cash Disbursements		$217,561.25
Cash in Bank, December 31, 1959		$ 11,573.44

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL AND BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL AND BRIEF

MOTION OF APPELLEE TO DISMISS APPEAL

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal from the final judgment of the Supreme Court of Wisconsin in the above action, *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N. W. 2d 404, on the following grounds:

1. The appeal is not within the jurisdiction of this Court, because not taken in conformity to statute.

2. The appeal does not present a substantial federal question.

THE QUESTION PRESENTED

The question raised by appellant is whether the orders of the Wisconsin Supreme Court integrating the state bar under its inherent supervisory authority over the legal profession violate any of appellant's rights under the Fourteenth Amendment.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of the Wisconsin Supreme Court entered on April 5, 1960, holding that the orders of that court integrating the bar of the state are constitutional, and affirming the judgment of the circuit court entered on October 23, 1959, which dismissed appellant's complaint.

In 1956, upon petition of members of the bar and after a hearing, the Wisconsin Supreme Court decided to integrate the bar for a trial period of two years, under its inherent authority over attorneys as officers of the court. *In re Integration of the Bar*, 273 Wis. 281, 77 N. W. 2d 602. In accordance with that decision and after a further hearing, the court entered an order on December 7, 1956, (273 Wis. p. vii, with an accompanying opinion at 273 Wis. p. viii, 79 N. W. 2d 441) promulgating rules and by-laws for the State Bar of Wisconsin (R. 17A-28).

Briefly, they require enrollment in the State Bar and the payment of annual dues by every attorney licensed or admitted to practice law. If the annual dues of a member are not paid, the board of governors may suspend him and during suspension he may not practice law. Provision is made for officers who are elected by the members, and for 29 members of the board of governors elected by the lawyers in 9 districts of the state. Provision is also made for meetings of the board, meetings of the members, referendum procedure, standing committees and sections. The machinery for handling grievance complaints is set up, but the power to suspend or disbar attorneys remains with the Supreme Court.

Appellant in his jurisdictional statement gives the impression by use of the word "substantially" that the services and activities of the State Bar are the same as the prior voluntary bar. In fact, he states that the only difference between the functions before and after the integration order of December 7, 1956 is compulsory membership and compulsory dues. (Jur. Statement, 9).

The court below took pains to point out some of the differences, particularly in the appendix to its opinion entitled "Major Activities of State Bar of Wisconsin" (R. 74-9). Two main areas of difference mentioned by the court are in the fields of unauthorized practice (R. 76) and grievance investigations (R. 78). It is obvious, too, that with greater financial resources from compulsory dues the State Bar is able to undertake and accomplish work which the old bar could never do.

At the end of the two-year trial period of integration a further hearing was held by the Wisconsin Supreme Court. It found that integration had proved successful and that none of the fears of objectors had materialized, and on December 22, 1958 ordered it continued on a permanent basis. *In re Integration of the Bar*, 5 Wis. 2d 618, 621, 93 N. W. 2d 601, 602-3.

Appellant enrolled in the State Bar and paid his annual dues of $15.00 in 1957 and 1958 (R. 12). The following year, however, he paid his dues under protest (R. 15), and on June 8, 1959 started an action in the circuit court to recover them from the appellee, the treasurer of the State Bar (R. 7-17). The appellee (defendant) demurred to the complaint upon three grounds, namely, (1) that the circuit court lacked jurisdiction over the subject matter of the

action, (2) that there was a defect of parties defendant in that the State Bar was a necessary party, and (3) that the complaint did not state a cause of action in any event (R. 34). The circuit court sustained all three grounds of demurrer and dismissed the complaint (R. 39-51).

Appellant then appealed to the Wisconsin Supreme Court which affirmed the judgment of the circuit court. Although it agreed that the lower court did not have jurisdiction, the Supreme Court decided to treat the action as one that had been started originally and properly in that court (R. 62). It considered and resolved the constitutional issue as if the proceeding were originally brought in its court, but also ordered that the judgment of the circuit court be affirmed (R. 73). This may raise the question whether the judgment appealed from also rests on an adequate non-federal basis; but appellee would prefer to limit his motion to dismiss to the two grounds above stated and as to which argument follows.

SUMMARY OF ARGUMENT

A. This appeal is not permitted under 28 U. S. C. § 1257 (2) because the validity of a state statute is not involved. "Statute" means *legislative* action in some form. In this case we are dealing with *judicial* action in the form of orders of the Wisconsin Supreme Court integrating the bar under its inherent judicial power.

B. (1) The idea of the integrated bar comes to us from England and Canada where the profession has been organized for a long time and subject to much closer regula-

tion than in this country. In the past 39 years 27 states have integrated their bars, with marked success.

(2) The practice of law is subject to regulation within the bounds of due process and the equal protection of the laws. The integrated bar is a reasonable form of such regulation because it provides a democratic process by which lawyers can govern themselves and under which minorities are protected; because it is not a private association but a governmental agency created for a public purpose and always subject to the supervisory control of the court; and because it is only fair and equitable that *all*, and not just *some*, who practice should unite in a common effort to improve the services of the profession and share the cost thereof in the form of annual dues.

(3) The validity of the integrated bar under the federal Constitution has been upheld in every state where the question has been raised. There are many cases on the subject, both as to compulsory membership and annual dues, but there is no conflict among them.

(4) The question also seems to have been settled in this Court by *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, where the Court upheld compulsory union membership and dues and said there was no more impairment of constitutional rights than in the case of the integrated bar.

(5) The legislative services of the State Bar are limited to matters directly relating to the courts, the administration of justice, and the practice of law. Its legislative work is non-partisan and non-political. The general public and the legislature are entitled to have the advice and views of the profession on proposed legislation in the above fields.

Other public agencies also engage in legislative activities, but no citizen can refuse to pay his taxes on that account.

(6) Appellant is deprived of no more freedom now than before the integrated bar. Every lawyer must become and remain a memb r of the bar, subject to regulation and discipline, whether the bar is organized or not. Appellant is not compelled to associate with anyone or to attend any meetings of the State Bar. He is free to vote in its elections or not, and is free to express his views on any subject. He is only compelled to pay his annual dues which are in the nature of a license fee for the regulation and improvement of his profession.

ARGUMENT

I. THIS APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT, BECAUSE THE VALIDITY OF A STATE STATUTE IS NOT DRAWN IN QUESTION.

This appeal is taken under 28 U. S. C. § 1257 (2), which permits review of the final judgments of the highest court of a state as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."[1]

---

1. Prior to the act of February 13, 1925, c. 229, 43 Stat. 936, 937, sec. 237 (a) of the Judicial Code provided for review on writ of error "where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity." The act of February 13, 1925 struck out the words "or an authority exercised under" any state, leaving the language as in the present sec. 1257 (2).

However, the validity challenged by appellant is the validity of orders of the Wisconsin Supreme Court integrating the state bar under its inherent judicial power.

It is the review of a *statute* of a state which is authorized by § 1257 (2). The reference in that section to a state statute has a well-defined meaning under the cases. It signifies state legislative action in some form, but is not limited to laws passed by a legislature. *Williams v. Bruffy*, 96 U. S. 176, 183. Thus, the order of a state department or board may be a statute in the exercise of delegated legislative authority. *Bluefield Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 683; *Lake Erie & W. R. R. Co. v. Pub. Util. Comm.*, 249 U. S. 422, 424. Municipal ordinances also fall within the same category. *King Mfg. Co. v. Augusta*, 277 U. S. 100, 102-14.

The test in these cases is whether the particular action proceeds from the legislative power of the state. It may emanate from delegated legislative authority, as in the case of state boards and municipalities, or from direct enactment by the legislature. *King Mfg. Co. v. Augusta, supra*, 103-4. Not every order of a state agency, of course, is a statute within the meaning of § 1257 (2). It must possess legislative characteristics and not be merely administrative in nature. See *Ex parte Williams*, 277 U. S. 267, 271-3.

In the present case, however, we are not dealing with *legislative* action of any kind or form. The orders complained of constitute *judicial* action by the Wisconsin Supreme Court in the exercise of its inherent authority over the practice of law. *In re Integration of Bar*, 273 Wis. 281, 283, 77 N. W. 2d 602, 603, (involving the first order of integration); *In re Integration of Bar*, 5 Wis. 2d 618, 622, 624-5,

93 N. W. 2d 601, 603, 604-5 (ordering integration continued on a permanent basis).

The issue whether integration was a matter for legislative or judicial action was raised squarely in *Integration of Bar Case,* 244 Wis. 8, 36-54, 11 N. W. 2d 604, 617-25. The 1943 legislature passed a statute providing for integration and for implementation by orders of the Wisconsin Supreme Court.[2] In a comprehensive opinion the court stated that the legislature had the power to impose minimum qualifications for attorneys in the exercise of the police power, but that the ultimate responsibility and authority with respect to the bar rested with the judicial department. The power to integrate the bar, it held, was a judicial and not a legislative function, and the statute was merely a legislative declaration that bar integration would promote the general welfare. In spite of such declaration by the legislature, the court declined to proceed with integration on its own order because so many attorneys were then in the military service. 244 Wis. 8, 54-5, 11 N. W. 2d 604, 624-5.

Appellant claims that such judicial action, in the form of the orders of the court integrating the bar, constitutes a statute of the state within the meaning of § 1257 (2). However, the only cases cited by him involve legislative action.[3] He refers to *King Mfg. Co. v. Augusta,* 277 U. S. 100, but this dealt with delegated legislative authority exercised in the form of municipal ordinances. There was a vigorous dissenting opinion by Justices Brandeis and Holmes (p. 115), protesting against stretching the words "statute of any state" to cover municipal ordinances, particularly after

2. The act, c. 315, Laws of 1943, became sec. 256.31, Wis. Stats.

3. Appellant's Jur. Statement, 3.

the amendment of 1925 which struck from the jurisdictional statute the words "or an authority exercised under" any state.[4]

The appellant would have this court go a long step beyond the above cases and hold that the integration orders of the Wisconsin court are state *statutes*. True, they have the effect of law, but that may be said generally of all judicial action. A similar contention has been made with respect to the provision in Article I, § 10, of the United States Constitution that "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ." It has been argued that this relates to judicial as well as legislative acts. However, it is well-settled that the prohibition is directed only against impairment by legislation and not by judgments of courts. *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451; *Barrows v. Jackson*, 346 U. S. 249, 260.

Accordingly, it would appear quite plain that an appeal does not lie under § 1257 (2). This Court may, of course, consider the appeal papers as a petition for certiorari under § 2103; but whether appeal or certiorari, it is submitted that a substantial federal question is not presented.

---

4. "I cannot believe that if Congress had intended to maintain our jurisdiction to review judgments sustaining such ordinances on writ of error, it would not have found clearer language in which to express its purpose," said Mr. Justice Brandeis, at p. 116. Justices Brandeis and Holmes also dissented in **Sultan Ry. Co. v. Dept. of Labor**, 277 U. S. 135, 137, where the order of a state bureau was held to be a state statute.

II. THE QUESTION IS NOT SUBSTANTIAL.

The question presented is basically whether the Supreme Court of Wisconsin can order integration and require every lawyer to be a member of and pay dues to the State Bar, as a legitimate exercise of the court's inherent power to supervise and regulate the practice of law. As will be demonstrated in the discussion below, all the authorities are so clear and settled on the question that there is no reason why this Court should entertain an appeal or grant certiorari.

A. *Anglo-American Origins and Development of the Integrated Bar.*

The organized or integrated bar is an outgrowth of the historic power to regulate the legal profession as officers of the court, in order to prevent abuses, maintain high standards, and improve the administration of justice.

Although Herbert Harley of the American Judicature Society was the early crusader for the organized bar in this country, the idea did not originate with him. It came, as did so many of our legal concepts and institutions, from England. Harley got his first glimpse of an integrated bar when he visited Toronto in the Canadian province of Ontario, and was so impressed that he determined to promote the idea in the United States.[5] The movement was also espoused by such leading legal figures as Charles Evans Hughes, Elihu Root, and John W. Davis.[6]

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5. Winters, **Integration of the Bar—You Can't Lose, 39 Jour. Am. Jud. Soc.** 110, 141 (1956).

6. Cohen, **The National Call for the Organization of an All Inclusive Bar,** 1 N. Y. L. Rev. 80, 82, 83, and continued at 135, 136 (1926).

Dean William Wicker of the Tennessee College of Law points out that "The English bar has been integrated for centuries and the bars in all of the provinces of Canada are integrated."[7] In England no person may be a member of the bar, practicing as a barrister, without becoming a member of one of the four Inns of Court.[8] Solicitors have an organization known as The Law Society. While membership in the Society is "voluntary," parliament has given it powers and duties with respect to the legal profession far beyond that of any integrated bar in this country.[9] Moreover, no solicitor may practice unless he is issued an annual license by the Society, for which a small fee is paid.[10] He also is compelled to contribute annually to the Society's "Compensation Fund," which is in the nature of a security fund for clients.[11]

The authority of the Inns of Court over the bar, delegated to them by the judiciary, include admission and discipline even to the extent of disbarring or suspending a member from practice.[12] The strictness with which barristers have been regulated in England from early days was discussed at length by Chief Judge Cardozo in *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 473, 162 N. E. 487, 490, where he noted that "The conduct of the barristers was

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7. Wicker, **Integrated Bars,** 21 Tenn. L. Rev. 708, 709 (1951). See, also, Wicker, **The Pros and Cons of an Integrated Bar,** 23 Tenn. L. Rev. 457, at 457 (1954); Winters, Bar Association Organization and Activities, 4-5 (1954); **Petition of Florida State Bar Ass'n.,** 40 So. 2d 903, 908; Winters, **Integration of the Bar—You Can't Lose,** supra note 5, at p. 141.

8. Lund, **The Legal Profession in England and Wales,** 35 Jour. Am. Jud. Soc. 134, 136 (1952). The author is the secretary of The Law Society of England.

9. Ibid, 138-42.

10. Ibid, 140.

11. Ibid, 141.

12. Ibid, 135-6.

regulated with minute particularity, even in matters so personal as the growth of their beards or the cut of their dress."[13]

The organized bar, in the form of the Inns, developed in England in the 17th and 18th centuries because it was felt by the judiciary that the Inns could maintain more effective control and discipline over the profession than the courts.[14] The idea of integration spread from England to Canada, but there the distinction between barrister and solicitor is disappearing. In Ontario The Law Society occupies a position similar to the English Inns of Court, and is the organization of all lawyers. The other provinces have similar societies.[15]

Accordingly, there was nothing new or radical about integration when the movement started in this country. It had been part and parcel of the English legal system for centuries; and today no lawyer in England would have the temerity to challenge the authority of the Inns or The Law Society to supervise and regulate his professional life. When integration found acceptance in the United States, however, it was in a form with less authority but more democracy than the organized bar of England.

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13. See, also, 4 Holdsworth's History of English Law, 264 (1924).

14. Ibid, Vol. 6, 443. Although the courts ordered that all attorneys must become members of an Inn, the Inns would not admit practicing attorneys or solicitors. This led to the development of a separate organization for them, which later became The Law Society.

15. Winters, Bar Association Organization and Activities, 4-5 (1954).

In 1921 North Dakota became the first state to have an integrated bar. Today there are organized bars in 27 states,[16] Puerto Rico, and the Virgin Islands. Integration in these states has been accomplished by (1) legislative action in the form of detailed statutes, or (2) legislative action authorizing the highest state court to integrate the bar, or (3) promulgation of rules by the Supreme Court by virtue of its inherent power to regulate the profession.

No state having an integrated bar has changed back permanently to a voluntary form of organization.[17] Time and experience are the tests of most undertakings. The success of the integrated bar where tried is attested by the comments of those in the best position to know—the Supreme Court judges of integrated states.[18] Without exception they bespeak the many improvements over the old voluntary bar.

B. *The Integrated Bar is a Reasonable and Democratic Method of Regulating the Legal Profession.*

Whether the practice of law is a right or privilege, it is subject to regulation within the bounds of due process and the equal protection of the laws. *Schware v. Board of Bar Examiners*, 353 U. S. 232, 239. It is usually called a

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16. Alabama, Alaska, Arizona, Arkansas, California, Florida, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Arkansas has an integrated bar for disciplinary purposes only.

17. The Oklahoma legislature in 1939 repealed the State Bar Act. However, within a few months the Supreme Court integrated the bar under its inherent power.

18. **Supreme Court Justices Present Views on Bar Integration,** 25 Jour. Am. Jud. Soc., 91, 126, 159 (1941-42), setting forth letters from judges of states having integrated bars.

privilege because it is conditioned upon compliance with certain qualifications, standards, rules, and regulations laid down by the judiciary or the legislature. *In re Greer*, 52 Ariz. 385, 389, 81 P. 2d 96, 98; *Matter of Co-operative Law Co.*, 198 N. Y. 479, 483, 92 N. E. 15, 16; *State Bar Ass'n. v. Conn. Bank & Trust Co.*, 145 Conn. 222, 234, 140 A. 2d 863, 870. In *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 470, 162 N. E. 487, 489, Cardozo, C. J., said:

> "'Membership in the bar is a privilege burdened with conditions.' Matter of Rouss, supra, 221 N. Y. page 84, 116 N. E. 783. The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

The question then becomes one of the constitutional reasonableness of the regulations imposed, and it is submitted there can be no question on that score with respect to the integrated bar.

In the first place, the integrated bar is not a *private* organization but a *public* agency. It is an arm or agency of the court established to promote the administration of justice. 114 A. L. R. 161, at 161. It was so held by the court below (R. 70). Thus, the appellant is not asked to join a private association but a governmental agency created for a public purpose and subject to the supervision of the Supreme Court.

Secondly, the Wisconsin lawyer in the organized bar enjoys far more freedom and democracy than any other licensee. Other professions are regulated by examining boards such as the boards of medical examiners, dental

examiners, pharmacy examiners, etc. In all instances the members of the profession have little or nothing to say about the functioning of such boards or appointments to them, which are made by the Governor. The integrated bar, on the other hand, operates under a democratic process whereby the members of the bar elect their officers and a board of governors, can initiate direct action in the assembly or by petition, and have the opportunity to participate in the work of the sections and committees. When it ordered integration to be made permanent, the Wisconsin court said:

> "These rules and by-laws constitute a democratic process by which members of the bar can govern themselves and can act in unison and by which minorities are protected; and they provide appropriate procedures for invoking the supervisory power of this court." *In re Integration of the Bar*, 5 Wis. 2d 618, 627, 93 N. W. 2d 601, 605.

Indeed, the integrated bar might much more appropriately be called "The Self-Governing Bar."

Although given the freedom and authority to govern itself, the organized bar cannot abuse its power because it is always subject to the supervisory control of the court. If it should embark on a program of improper policies or procedures, the court can and promptly would take remedial action. *In re Integration of the Bar*, 5 Wis. 2d 618, 624-5, 93 N. W. 2d 601, 604. Thus, there is a check and balance system to prevent arbitrary action or usurpation of power.

The integrated bar has been defined as "the process by which every member of the bar is given an opportunity to do his share in carrying out the public service of the bar,

and obliged to bear his portion of the responsibility." 114 A. L. R. 161, at 161. It is in the best traditions of fairness and equality to require all who are privileged to practice law and become a part of the judicial system to unite in a common effort to increase their own capabilities, maintain high standards for all, and improve their service to the public. It is likewise only reasonable that all—not just some—who have that privilege and responsibility, should bear their fair share of the costs.

With limited resources, interest, and participation, the old voluntary bar could not hope to undertake the services and achieve the goals of the organized bar. The differences in the two types of organization and the superiority and success of the integrated bar are discussed in the opinion of the court below and in *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N. W. 2d 601.

Surely there can be no question that it offends neither due process nor the equal protection of the laws to require all members of the bar to act as a democratic, organized group in the discharge of their public responsibilities under the supervisory control of the courts, and to make contributions to such joint effort in the form of annual license fees.

C. *The Validity of the Integrated Bar Under the Federal Constitution Has Been Upheld in Every Case In Which the Question Has Been Raised.*

Appellant has combed the cases but has not been able to produce a single one holding that the integrated bar violates the United States Constitution.

He is well aware of the multitude of authorities in the states sustaining validity in general and compulsory membership and license fees in particular, whether integration is accomplished by statute or by court order. They are collected in 114 A. L. R. 161 and 151 A. L. R. 617.

They demonstrate that there is no conflict in the cases and that every time the integrated bar has been challenged on constitutional grounds, its validity has been upheld. Some of the more important cases are cited here:

Carpenter v. State Bar of California, 211 Cal. 358, 360, 295 P. 23, 24. (Imposition of annual dues sustained. "The validity of the State Bar Act as a regulatory measure under the police power has been repeatedly upheld by this court.")

Herron v. State Bar of California, 24 Cal. 2d 53, 64-5, 147 P. 2d 543, 549-50. (Constitutionality challenged and upheld.)

Petition of Florida State Bar Ass'n., 40 So. 2d 902, 906-7. (Integration by court under its inherent power upheld as a valid regulation of the bar, both as to requirement of membership and payment of dues.)

In re Mundy, 202 La. 41, 49-51, 11 So. 2d 398, 400-1. (Integration and annual dues upheld under the state's police power and under the court's inherent power to regulate the practice of law.)

Ayres v. Hadaway, 303 Mich. 589, 596-8, 6 N. W. 2d 905, 907-8. (The right to practice is not a property right but a privilege subject to regulation. Integration does not violate the due process clause of the Fourteenth Amendment.) To the same effect is *Emmons v. Smitt*, 58 F. Supp. 869, 873-7 (E. D. Mich. S. D.)

Petition for Integration of Bar of Minn., 216 Minn. 195, 200, 12 N. W. 2d 515, 518. (Integration by court order "would not in any respect violate the constitutional rights of any lawyer already admitted to practice.")

In re Integration of Nebraska State Bar Ass'n., 133 Neb. 283, 286-90, 275 N. W. 265, 266-8. (Comprehensive discussion of the right to integrate and regulate the bar under the court's inherent power.)

In re Scott, 53 Nev. 24, 39-40, 292 P. 291, 295. (Whether the practice of law is a privilege or property right, State Bar Act does not violate federal or state constitution.)

In re Platz, 60 Nev. 296, 302-9, 108 P. 2d 858, 862-4. (Constitutional objections to compulsory membership and dues considered and rejected.)

In re Gibson, 35 N. Mex. 550, 557-63, 4 P. 2d 643, 647-50. (Extensive discussion of validity of compulsory membership and dues with conclusion that there is no violation of the Fourteenth Amendment.)

Kelley v. State Bar of Oklahoma, 148 Okla. 282, 282-3, 298 P. 623, 624. (Whether or not the right to practice is a property right, integration is a constitutional form of regulation.)

Integration of the Bar Case, 244 Wis. 8, 44, 11 N. W. 2d 604, 620. (After extended discussion the court concluded

that integration "in no way violates the provisions of the Fourteenth Amendment.")

The unanimity of court decisions on the validity of bar integration, including compulsory membership and annual fees, led one writer to conclude: "It seems clear in the light of the decisions that all the objections heretofore raised as to the constitutionality of bar integration have now been settled. In every state in which questions as to the validity of these statutes have been raised, their constitutionality has been upheld."[19]

The only authority for the invalidity of any phase of bar integration is an Idaho case in which the bar statute was found to violate a *state* constitutional provision relating to the creation of corporations. *Jackson v. Gallet*, 39 Ida. 382, 228 P. 1068. However, the statute was amended to meet this difficulty, and the court subsequently held integration valid. *In re Edwards*, 45 Ida. 676, 266 P. 665.

The best appellant can do is to cite a few dissenting opinions.[20] That he cannot do more is not his fault, because there just is no conflict among the cases on the validity of integration under the federal Constitution.

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19. Wicker, **Integrated Bars,** 21 Tenn. L. Rev. 708, 712 (1951); and Wicker, **The Pros and Cons of an Integrated Bar,** 23 Tenn. L. Rev. 457, 459 (1954).

20. Appellant's Jur. Statement, 30-1.

D. *The Question Seems Settled In This Court.*

No integrated bar case has been before the United States Supreme Court. However, this Court has already passed upon the issue raised by appellant, compulsory membership and dues, in the field of labor organizations. In *Railway Employes' Dept. v. Hanson,* 351 U. S. 225, the Court upheld a railroad union shop agreement under the Railway Labor Act, requiring all employees to belong and pay dues to a union. It was argued that a union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, association, and thought. The Court found no infringement of constitutional rights, and referring to the integrated bar, it said (351 U. S. at 238):

> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be *in the case of a lawyer who by state law is required to be a member of an integrated bar.*" (Emphasis supplied)

In *DeMille v. American Federation of Radio Artists,* 77 A. C. A. 430, 175 P. 2d 851, affirmed 31 Cal. 2d 139, 187 P. 2d 769, the defendant union, consisting of radio entertainers and performers organized on a union shop basis, levied an assessment of $1.00 per member for the purpose of opposing a referendum on the question of a state right-to-work law. DeMille, a member of the union, objected to the assessment on the ground that it invaded his constitutional rights of suffrage, freedom of speech, press, and assembly. However, all the judges who considered the case in the trial court, the intermediate appellate court, and the California Supreme Court were of the opinion that there

was no impairment of constitutional rights. This Court denied certiorari, 333 U. S. 876.

If there is no constitutional question about the all-union labor organization, there should also be none about the all-lawyer bar organization. In the case of the integrated bar, there is the additional justification for compulsory membership and dues in the fact that the legal profession is entrusted with special responsibilities and is subject to close supervision and control as a calling affected with a public interest.

E. *The Legislative Activities of the State Bar Do Not Raise Any Question of Validity.*

Shorn of all the breast-beating about "freedom of association," appellant's argument seems to boil down to his objection to legislative activities on the part of the State Bar.

Actually, the legislative studies and work of the State Bar are a small part of its activities. Whatever legislative work it does is limited by the rules and by-laws promulgated by the Wisconsin Supreme Court. Sections 4 and 9, Art. IV, of the by-laws (R. 26-27) define the duties of two committees in the legislative field as follows:

> "*Section 4. Committee on administration of justice.* This committee shall study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system."

"*Section 9. Committee on legislation.* This committee shall study all proposals submitted to the Wisconsin Legislature or the Congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals."

The legislative work of the integrated bar, as defined by the Wisconsin court, is entirely non-partisan and non-political. It engages in no activities in support of party candidates or political programs, such as in the case of *International Association of Machinists v. Street*, No. 258, O. T. 1959, now pending before this Court.

The court below examined the activities of the State Bar in the field of legislation since the bar was integrated in 1956. It found in every instance that the measures advocated or opposed dealt only with the administration of justice, court reform, or legal practice (R. 66-7). It said:

"We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association." (R. 67)

If appellant is correct in his contention that his constitutional rights are invaded because he must support an

agency which takes positions on legislative matters, then the wheels of democratic government must come to a halt. A few illustrations will demonstrate the fallacy of his position.

One example, cited by the court below, is the state Judicial Council, supported by taxes which no taxpayer can escape. Among its functions is the duty to "recommend to the legislature any changes in the organization, jurisdiction, operation and methods of conducting the business of the courts which can be put into effect only by legislative action." § 251.181 (2) (f), Wis. Stats.

Another example is the state Legislative Council which functions in a much larger area. § 13.35, Wis. Stats. It operates with a permanent staff and various committees, studying problems in the different governmental fields and making recommendations for legislative or administrative action. Except for gifts or grants, it is supported by state tax monies.

Also, everyone knows that almost every state agency or department devotes time and effort to the study of matters before the legislature affecting it, prepares amendments or changes in the laws, appears before legislative committees, and talks to legislative representatives. This is also true of many federal departments. Often the bills are highly controversial and the views expressed by public agencies through their employees are hotly opposed by private citizens.

Yet in all these instances it would be unthinkable to say that the taxes which go in part to defray the expenses of such activities are invalid because some taxpayers may oppose the views expressed by public officials.

The court below also cited the recent case of *Dulles v. Johnson*, 273 F. 2d 362 (C. A. 2), in which bequests to certain New York bar associations were held to be deductible for federal estate tax purposes. The Court of Appeals discussed the legislative activities of the bar groups, which were similar in scope to those of the State Bar of Wisconsin, and found they did not constitute propaganda but were non-political and "scientific, educational and charitable" in nature (p. 367).

Like every other individual member of the State Bar, the appellant is free to express his own views at any time on legislative or other matters. He is free to disagree and state his disagreement whenever he chooses. However, the fact that he may oppose a position taken by the bar's board of governors should not alter the freedom of that board to take a position as the duly elected representatives of the lawyers of Wisconsin.

F. *There Is No Question of Freedom of Association.*

Appellant complains that he is deprived of his freedom of association by having to be a member of and pay dues to the State Bar of Wisconsin.

However, he was required to be a member of the bar before integration. Every practicing lawyer must be admitted to the bar and remain a member in good standing, regardless of whether the bar is integrated or not. He must be admitted and submit to regulation and supervision because he is an integral part of the judicial process and his is a special calling demanding the highest standards to protect the public interest.

Inasmuch as appellant is required to be and remain a member of the bar in order to practice law, what constitutional difference is there in the bar being organized or voluntary?

What freedom is impaired by making every lawyer pay his fair share of regulating and improving his profession, rather than to leave it to his personal volition so that some will bear the whole load and the others will escape?

As the court said below (R. 64-5), the rules and by-laws of the State Bar do not compel the appellant to associate with anyone. He is free to vote in elections or not. He is free to attend meetings or stay at home. He is free to disagree and voice his views on any subject, regardless of any position taken by the State Bar. The only compulsion or restriction on his freedom is that he pay annual fees of $15.00 a year.

Appellant has no answer to these propositions except to indulge in platitudes and rhetoric about First Amendment freedoms, or to set up straw men and knock them down. For example, on the matter of annual fees he exclaims that anyone "would vehemently assert that exaction of annual dues to support the Socialist, Republican or Democratic parties is a deprivation of his freedom of speech, assembly and petition." (Jur. Statement, 24.)

Appellant has cited First (and Fourteenth) Amendment freedom cases, such as freedom to speak at a public meeting (*Terminiello v. Chicago*, 337 U. S. 1), censorship of motion pictures (*Burstyn v. Wilson*, 343 U. S. 495), restrictions and censorship in connection with the distribution of circulars (*Schneider v. Irvington*, 308 U. S. 147), com-

pulsory disclosure of NAACP membership lists (*Bates v. City of Little Rock*, 361 U. S. 516), and segregation by city ordinance (*Buchanan v. Warley*, 245 U. S. 60); but none of these has even a remote similarity to the case of the integrated bar or the constitutional basis thereof.

He has closed his eyes to the unanimity of court decisions upholding the validity of integration and the payment of annual fees. He has refused to face or accept the fact that this Court has recognized fully the right of labor to organize all-union shops or associations and to compel every worker to join and pay dues, as to which the Court has said there is no more infringement of First Amendment rights than "in the case of a lawyer of a state who by state law is required to be a member of an integrated bar." *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 238.

Appellant's freedoms of association, speech, assembly, etc., are in no way violated by the integrated bar. His voice and actions are not restricted any more now than before the bar was organized. The privilege or right to practice law carries with it a correlative obligation. The profession has always been subject to control and supervision by the courts, because lawyers are so intimately connected and bound up with the judicial process.

Improvement of the bar and its services in the administration of justice is a necessary and worthy goal. Both the inherent authority and responsibility of the courts to regulate the profession and maintain high standards on the part of its members are well recognized. The Wisconsin Supreme Court has undertaken to integrate the bar as a reasonable and legitimate method of regulating the pro-

fession, and in a form which provides a democratic system of self-government.

This Court will be loathe, we are sure, to interfere with the exercise by the Wisconsin or any other state Supreme Court of its inherent and historic power with respect to the bar and to say that such action is arbitrary or capricious. It will be even more reluctant to do so in this instance, we believe, because appellant has been unable to demonstrate that the issue of the validity of integration is unsettled, or to cite any conflict in the many cases on the subject, or to show any difference in the integration orders of the Wisconsin Supreme Court which would violate his constitutional rights.

Accordingly, by none of the criteria of this Court has he raised any substantial question of constitutionality.

CONCLUSION

For the reasons stated, it is respectfully submitted that the appeal should be dismissed and certiorari denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee,

ON APPEAL FROM THE SUPEME COURT OF WISCONSIN

BRIEF FOR THE APPELLANT

TRAYTON L. LATHROP,
Appellant

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In The

Supreme Court of the United States

October Term, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee,

ON APPEAL FROM THE SUPEME COURT OF WISCONSIN

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported as *Lathrop v. Donohue* (1960) 10 Wis. 2d 230, 102 N. W. 2d 404; is printed on pages 1a to 21a of the Appendix to the Jurisdictional Statement, and is printed on pages 66-81 of the printed record. The opinion of the Circuit Court for Fond du Lac County, Wisconsin, which was affirmed by the judgment here appealed from is not published but is printed on pages 22a to 39a of the Jurisdictional Statement and on pages 49 to 63 of the printed record.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This action was commenced by the appellant in the Circuit Court for Dane County, Wisconsin, and was removed at the request of the appellee to the Circuit Court for Fond du Lac County, Wisconsin.

The action was brought to recover the sum of $15.00 which was paid under protest by the appellant to the appellee, under coercion of certain rules adopted by the Supreme Court of the State of Wisconsin which compel membership in and support of an association of attorneys known as the State Bar of Wisconsin by all persons engaged in the practice of law in that state. The appellant is an attorney at law residing and practicing in the City of Madison, Wisconsin (R. 1).* The appellee is the treasurer of said association and resides in the City of Fond du Lac, Wisconsin (R. 1).

It was asserted in the Circuit Court by the appellant that said rules, insofar as they coerce the appellant to support said association, violate the Fourteenth Amendment of the United States Constitution (R. 7).

Upon a demurrer to the complaint, the Circuit Court rendered an opinion stating that the Wisconsin Supreme Court had exclusive jurisdiction of the subject matter of the action (R. 60); that there was a defect of parties defendant (R. 61); and that said rules do not violate the Fourteenth Amendment. (R. 61-62) Judgment was entered dismissing the complaint "upon its merits." (R. 64) On appeal to the Supreme Court of the State of Wisconsin, that

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*The reference is to the printed record.

court treated the action as if it were commenced in that court (R. 68); held that there was no defect of parties (R. 68); and held that said rules do not violate the Fourteenth Amendment. (R. 77) The Wisconsin Supreme Court entered judgment on April 5, 1960 affirming the judgment of the Circuit Court. (R. 65-66).

The Notice of Appeal was filed in the Wisconsin Supreme Court on May 5, 1960 (R. 82), and the Jurisdictional Statement was filed in this court on June 30, 1960. On October 10, 1960, this court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. (R. 85)

The jurisdiction of this court is invoked under section 1257 (2), title 28, U. S. C., which provides for appeals from the highest court of a state:

> ". . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In this case, there is drawn in question the validity of certain rules promulgated by the Wisconsin Supreme Court on the ground that they are repugnant to the Constitution of the United States and the decision appealed from is in favor of its validity.

Thus, section 1257(2), Title 28, is applicable unless it can be said that said rules do not constitute a statute.

It is respectfully submitted that they do constitute a statute.

The rule making power of a state may be exercised in various ways. It may be exercised by the representatives of the people in an organic convention. The people may vest the rule making power in an elective body called a senate or an assembly or in a combination of bodies. The people may vest such rule making power in local units of government such as cities or villages, as has been done by "home rule" constitutional provisions. The people may vest both rule making power and the power to judge controversies in the same body as has been done in the case of some of the state senates, and as has been done in the case of some state courts.

When the Congress of the United States used the word "statute" in the section 1257 (2), it referred to rules of law adopted by the people of a state through their representatives.

In the case at hand, rules similar to those involved here have been enacted by bodies called senates, assemblies and houses of representatives in other states.[1] However, in Wisconsin the court asserted that the people have delegated this rule making function to it. See State Bar Rule 1 (R. 7) and *Integration of Bar Case* (1943) 244 Wis. 8, 11 N. W. 2d 604, 12 N. W. 2d 699. The rule making power is thus divided between the Senate and Assembly on the one hand and the Court on the other. By the same token, in Wisconsin the power to decide controversies is divided between the Court on the one hand and the Senate on the other. "The court for the trial of impeachments shall be composed of the senate." (Art. VII, Sec. 1, Wis. Const.)

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[1] See for example Deering's California Codes, Business and Professions Code, sections 6002, 6003, 6125 and 6143. See also Giles, Clarence F., **An Analysis of the Integrated Bar**, 17 Albany Law Review p. 232.

The appellee's motion to dismiss the appeal asserted that section 1257 (2) referred only to the exercise of legislative authority. This may be true. But to legislate is to make rules of conduct and sanctions for the enforcement of them.

In *State v. Lange Canning Co.* (1916) 164 Wis. 228, 157 N. W. 777, 160 N. W. 57, the court held that the "legislative power" is the power to make laws and that law is defined as

> "... the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of its members." (164 Wis. p. 235.)

The Circuit Court in the case now before this court held that

> "A rule promulgated by the Supreme Court of Wisconsin is as effective as a law passed by the Legislature, *and in effect is a law of the State.* . . ." (R. 59, emphasis added)

The statement of the Circuit Court is sound. The Wisconsin Supreme Court did not disagree with that statement. The rules adopted by the Wisconsin Supreme Court are not merely a judgment as appellee asserted on page 10 of his motion to dismiss.

Indeed, the Wisconsin Supreme Court, in this case, held that the rules integrating the bar and continuing the same were "... an exercise of the police power. ..." (R. 74)

The pronouncement of the court in *Stevens v. Griffith* (1884) 111 U. S. 48, 50, is applicable here:

". . . Any enactment, to which a State gives the force of law, whether it has gone through the usual stages of legislative proceedings *or been adopted in other modes of expressing the will of the State, is a statute of the State* within the meaning of the Acts of Congress touching our appellate jurisdiction. . . ." (Emphasis added)

To the same effect is *King Mfg. Co. v. Augusta* (1928) 277 U. S. 100, 103-104, where the court stated:

"It of course rests with each state to determine in what form and by what agencies its legislative power may be exerted. . . . [W]hether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the state. . . ."

In *Jamison v. Texas* (1943) 318 U. S. 413, 414, the court was asked to reconsider the *King* decision and refused to do so. In accord are *Poulos v. New Hampshire* (1953) 345 U. S. 395, 402 and *Adamson v. California* (1947) 332 U. S. 46, 48.

In *Hamilton v. University of California* (1934) 293 U. S. 245, the court, apparently unanimous on this point, held that a rule of the Board of Regents of a state university was a statute, for appeal purposes. The court stated:

". . . [B]y the California constitution, the regents are . . . fully empowered in respect of the organization and government of the university which, as it has been held, is a constitutional department or function of the state government. . . . The assailed order prescribes a rule of conduct and applies to all students belonging to the defined class. . . . The meaning of 'statute of any state' *is not limited to acts of state legislatures. It is used to*

include every act legislative in character to which the state gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law making power. . . ." (emphasis added) (pp. 257-258)

It is respectfully submitted that under the cases decided by this court over a period of at least 75 years the word "statute" in section 1257 (2) and its predecessors has been deemed to include rules of conduct adopted by a state agency such as the one here involved.

It is therefore submitted that the court has jurisdiction over this case on this appeal. If it should be determined that it does not have jurisdiction under section 1257 (2) it is requested that *certiorari* be granted pursuant to § 2103 of title 28, U. S. C. See *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 236.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the validity of certain rules adopted by order of the Supreme Court of the State of Wisconsin on December 7, 1956, and on December 22, 1958 reported respectively in Volume 273 Wisconsin Reports on pages vii to xxv and in 5 Wis. 2d pp. 618, 627, 93 N. W. 2d 601, 605.

The first order promulgated for a period of two years certain rules and by-laws for an association to be known as "State Bar of Wisconsin" requiring attorneys to belong to said association. The second order continued said rules in effect indefinitely. The rules and by-laws, as continued in effect by the December 28, 1958 order, are attached to

the complaint and appear on pages 7 to 40 of the printed record.

Because of the length of the rules and by-laws they are not set forth at this point. However, portions of the rules and by-laws follow:

> "All persons licensed to practice law in this state are hereby organized as an association to be known as the 'State Bar of Wisconsin' . . ." (Rule 1, section 1)
>
> "No individual other than an enrolled active member of the State Bar shall practice law in this state . . ." (Rule 2, section 4)
>
> ". . . Every active member shall pay annual dues of fifteen dollars . . ." (By-laws, Article I, section 2)
>
> ". . . the Board of Governors by resolution shall suspend the membership of each dues delinquent member. . . . [N]o person whose membership is suspended for the non-payment of dues shall be entitled to practice law during the period of such suspension." (By-laws, Article I, section 3)

The following portion of the Fourteenth Amendment to the United States Constitution is involved:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION INVOLVED

This appeal presents the question of whether a state, under the Fourteenth Amendment to the United States Constitution, may coerce lawyers to belong to and support an association of lawyers. The question has a direct bearing upon the larger question of whether the state, under said amendment, may coerce any class of individuals to belong to an association.

As stated in the Notice of Appeal, the question involved is as follows:

> Do the orders and rules of the Supreme Court of the State of Wisconsin referred to at pages 7-8, *supra*, of this brief, and the rules and by-laws which were promulgated thereby deprive the appellant, who is a native of the State of Wisconsin and a residenct licensed practicing attorney in said state and has no income outside of that received from the practice of law, of his rights of freedom of association, assembly, speech, press, conscience and thought, or of his liberty or property without due process of law or deny to him equal protection of the law or otherwise deprive him of rights under the Fourteenth Amendment of the Constitution of the United States by compelling him as a condition to his right to continue to practice law in the State of Wisconsin, to be a member of and financially support an association of attorneys known as the State Bar of Wisconsin, which association functions substantially the same and carries on substantially the same work as voluntary associations of attorneys, and, among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion; and, therefore, are said orders, rules and by-laws, insofar as they coerce the appellant to be a member of and support said association, invalid on the ground that they are repugnant to the Constitution of the United States?

STATEMENT OF THE CASE

Parties

The appellant is a native of the State of Wisconsin, a resident of the City of Madison in said State, and is engaged in the practice of law as a member of a law firm in said city. He received a Bachelor of Arts degree from the University of Wisconsin in 1943, and after an interval for military service, was graduated from the Law School of the University of Wisconsin in February, 1948. (R. 1)

The appellant was licensed to practice law in the State of Wisconsin in February, 1948, after having complied with all of the requirements therefor, and has been so licensed and has practiced law in the City of Madison, Wisconsin ever since. (R. 1-2)

The appellant's only training and his only means of livelihood is as a lawyer. He has no income outside of that derived from the practice of law. (R. 2)

The appellee is a resident of the City of Fond du Lac, Fond du Lac County, Wisconsin, and is engaged in the practice of law in said city. He is the treasurer of an organization known as the "State Bar of Wisconsin," referred to on page 7, *supra*, of this brief. (R. 1)

Requirement of Membership in a Bar Association

Compulsory membership in a statewide bar association, described as an "integrated" bar association was considered by the Wisconsin Bar Association as early as 1923.[2]

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[2]See history set forth in **Integration of Bar Case** (1943) 241 Wis. 8, 14, 11 N. W. 2d 604, 607.

In 1935 a bill for creation of a compulsory association of attorneys to be known as the "Wisconsin Bar Association" was passed by both houses of the legislature, but vetoed.[1] Bills for "integration" were introduced in the 1937, 1939 and 1941 legislatures, but failed of passage.[2] In 1943, a bill authorizing the Supreme Court of Wisconsin to provide for a compulsory association to be known as "State Bar of Wisconsin" was passed by both houses of the legislature, but was vetoed.[3] The veto was purportedly overridden, and the act was published as section 256.31, Wisconsin Statutes, which still remains in the Wisconsin Statutes and reads as follows:

> "256.31 *State Bar of Wisconsin.* (1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.
>
> "(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the effiecient administration of justice."

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[1] Ibid. See also Bill Jacket for Bill 119-S 1935 Legislature, Secretary of State's Office of State of Wisconsin.

[2] 244 Wis. p. 14, 11 N. W. 2d p. 607.

[3] 244 Wis. p. 16, 11 N. W. 2d 608. See veto message of Governor Walter S. Goodland at pp. 40a to 41a of the appendix to the jurisdictional statement.

A controversy arose as to whether the veto was validly overridden. The Wisconsin Supreme Court, in a self-advisory opinion, ruled that it was.[7] The court also ruled that the act did not delegate legislative powers and did not deny equal protection of the laws.[8] Justice Fowler dissented, stating that the court should not "integrate the bar of the state into an association or establish regulation for the conduct of the association's affairs."[9] He stated that if the act is valid, the legislature ". . . may, for like reason if there be any, organize the barbers and the plumbers and the machinists and the members of any other trade or class of workmen into a trade or labor union. . . ."[10]

No rules were considered, and the court decided not to adopt any rules at that time.[11]

In 1946 the President of the Wisconsin Bar Association petitioned for establishment of an integrated bar association. The court refused to order integration, stating that an integrated bar could not use its dues to maintain a legislative agent; that it doubted that it could conduct propaganda in defense of the legal profession; and that the court felt quite sure that it could not seek legislative definition of the boundary lines of the legal profession.[12]

In 1955, the movement for an "integrated" bar association was revitalized by Alfred E. LaFrance, President of the Wisconsin Bar Association. He urged that *all lawyers*

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[7] 244 Wis. pp. 16-36, 11 N. W. 2d 609, 617.

[8] 244 Wis. pp. 36-45, 11 N. W. 2d 617-621.

[9] 244 Wis. 55, 11 N. W. 2d 625.

[10] 244 Wis. 56, 11 N. W. 2d 625.

[11] 244 Wis. 54, 56a-56b, 11 N. W. 2d 625, 12 N. W. 2d 699-700.

[12] **In re Integration of Bar** (1946) 249 Wis. 523, 529, 25 N. W. 2d 500, 502-503.

of the state should participate in legislative matters in determining the qualifications of attorneys, in problems of judicial administration, in judicial selection, in legal aid, in handling grievances and in a "vast program" of public relations. With respect to legislative work, he stated:

> "All of the lawyers of the state, through their association, should participate in making recommendations for changes and advancements in the procedural and substantive law of the state; *all of the lawyers of the state through their unified association, should actively participate in the molding of all future legislation and in promoting educational programs concerning proposed and considered constitutional changes.*"[12] (Emphasis added)

On petition by Mr. LaFrance and others, authorized by the House of Governors of the Wisconsin Bar Association, and alleging that only 68% of the lawyers in the state are members of the Wisconsin Bar Association,[13] the Wisconsin Supreme Court, in June 1956, directed that rules be drawn by the petitioners.[14]

The reasons given by the court for its order were that membership in the voluntary association had become static and that integration would result in registration of all lawyers practicing in the state.[15] All members of the court participating in the 1946 decision, except for one, had been replaced.

Rules for an integrated bar association were adopted by the court on December 7, 1956, with the provision that

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[12] 28 Wis. Bar Bulletin, No. 5, p. 6 (Oct. 1955).

[13] (R. 2) See also 21 Wis. Bar Bulletin, No. 2, p. 21 (April, 1956).

[14] **In re Integration of Bar** (1956) 273 Wis. 281, 285, 77 N. W. 2d 602, 604.

[15] 273 Wis. pp. 284-285, 77 N. W. 2d 604.

they were to be in effect for a period of two years from January 1, 1957."

The court expressly stated that the rules were adopted pursuant to the court's "... inherent authority over members of the legal profession as officers of the court. ..." (R. 7) The court did not rely upon section 256.31 *supra*, although the same name, i.e., "State Bar of Wisconsin" was used.

On December 22, 1958, the Wisconsin Supreme Court continued the said rules, with minor changes made since 1956, in effect for an indefinite period of time.[16]

Nature and Activities of the State Bar of Wisconsin

The rules adopted by the Wisconsin Supreme Court commence under the heading *"Creation of Association."* (R. 7) and provide that all persons licensed to practice law in the state "are organized *as an association* to be known as the 'State Bar of Wisconsin.' ..." (R. 7) (Emphasis added)

"The purposes of the *association* ..." (emphasis added) include aiding the courts in carrying on and "improving the administration of justice"; fostering and maintaining learning, competence, and public service, and high standards of conduct; safeguarding "the proper professional interests" of attorneys, encouraging the formation and activities of "local bar associations"; and providing a forum for discussion of "subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the rela-

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[16](R. 2-3) See also 273 Wis. vii et seq., 79 N. W. 2d 441-442.

[17](R. 3, 47) The opinion at pages 40 to 47 of the record is reported as **In re Integration of the Bar** (1958) 5 Wis. 2d 618, 93 N. W. 2d 601.

tions of the bar to the public, and to publish information relating thereto. . . ." (R. 8)

The rules consist of two parts, one denominated "State Bar Rules" (R. 7-26) and the other called "State Bar By-laws." (R. 27-40)

The principle distinction between the "rules" and the "by-laws" is that the rules may be changed only by the court while the 'by-laws" may be changed without prior court action by a referendum of the members or by action of two-thirds of the Board of Governors. (R. 26)

The rules give corporate character to the association—provide that it may sue and be sued, enter into contracts and hold and dispose of real and personal property. (R. 7-8)

Membership is defined by the rules as including all persons who are licensed to practice law in the State of Wisconsin, including those who are not residents. (R. 8) Every person licensed to practice law is required to enroll "by registering his name with the secretary of the association." (R. 8) Only active members may practice law. (R. 9) Dues not exceeding $20.00 per year are to be set by the by-laws. (R. 9-10) The rules provide that the board of governors may suspend the membership of any member who does not pay his dues (R. 10) and that no one shall be entitled to practice law during the period of suspension. The by-laws provide for membership dues at $15.00 per year (R. 28), and further provide the board of governors "*shall*" by resolution suspend the membership of any person who does not pay his dues, and that no one shall be entitled to practice law during the period of suspension. (R. 29)

All dues are required to be paid to the "treasurer of the *association* and shall constitute a fund for the payment of the expenses of the *association*." (R. 10) (Emphasis added)

The association has a president, president-elect, a secretary and a treasurer. (R. 10-11)

"The affairs of the *association*" (emphasis added) are managed and directed by a Board of Governors which consists of the officers of the association, the immediate past president of the association and 29 members elected from districts. (R. 12)

The Board of Governors meets at least four times a year (R. 14) and a seven-member Executive Committee carries on the functions of the Board of Governors between meetings. (R. 16-17)

The Board of Governors has the control over the finances. (R. 19)

Meetings of the association as a whole have power only to recommend action to the Board of Governors, or to initiate a referendum by a resolution adopted by an affirmative vote of at least 200 members. (R. 18)

An executive director and his staff assist the board, the officers of the association, and the chairmen of the committees and sections, and are paid out of the funds of the association. (R. 4, 39)

The association was intended to be a continuation of the Wisconsin Bar Association, under a new name with a revised governing body. The officers, governing body, and committee of the Wisconsin Bar Association ceased to func-

tion just prior to the time that the officers, governing body and committees of the State Bar of Wisconsin began to function. (R. 3) The Supreme Court appointed as initial general officers of the integrated association the same persons who were officers of the voluntary association. (R. 3; 273 Wis. Reports pp. vii to viii) The by-laws adopted by the Supreme Court provided that the integrated association was to select the American Bar Association delegates theretofor selected by the Wisconsin Bar Association and to select the members of the state Judicial Council previously selected by the Wisconsin Bar Association. (R. 34) The said by-laws provided that the integrated association is to publish the "Wisconsin Bar Bulletin" which was previously published by the Wisconsin Bar Association. (R. 4-5, 37) All of the files and property of the Wisconsin Bar Association were taken into the possession of the integrated bar association. (R. 3)

The integrated association carries on substantially the same work and functions in substantially the same manner as it did when it was a voluntary association and as does the American Bar Association. (R. 5)

The work of the association is in large part carried on under the direction of the Board of Governors by committees and sections which have a wide variety of duties and functions, including studying the curricula and teaching methods employed in law schools; promotion of programs for post graduate education of lawyers; recommending and examining changes in practice and procedure and in the judicial system; studying and making reports with respect to judicial selection, terms and compensation; recommending methods of enforcement of Cannons of Ethics and

amendments thereto; interpreting to other professions the "proper scope of the practice of law"; encouraging local bar associations to furnish legal aid; seeking elimination of unauthorized practice; advancing public acceptance of the objects and purposes of the association; studying, supporting and opposing proposals in the Wisconsin legislature and the United States Congress relative to changes with respect to the courts and "the practice of law"; and publication of a magazine, newsletter and calendar service. (R. 34-37) Among the fields included within the practice of law in which study is made and changes in substantive law are recommended, are laws relating to corporations, business, divorce and marriage, insurance, negligence, compensation, labor relations, the military, property and trusts and taxation. Sections are established for these fields. (R. 15, 37-38)

Another activity of the association comes under the head of Grievance Committees which are established for each district in which members of the Board of Governors are elected. (R. 20-25) Like certain voluntary county associations of recent years (Wis. Stats. § 256.28 (2a)), these committees are given the power to subpoena attorneys by the threat of disciplinary action on the part of the Supreme Court. (R. 21) The committees make recommendations to the State Bar Commissioners, an agency created by the legislature whose members are appointed by the court, which has had investigatory power since 1927 (Wis. Laws 1927 c. 314). The work of the committees does not supersede the authority of the State Bar Commissioners (R. 25-26), but it has reduced the budgetary requirements of the latter agency to the extent of about $400 per year. (R. 81)

One of the main objects and purposes of the integrated association is the promotion of law reform. (R. 5) In the course of this work the association has, without solicitation, opposed the adoption of legislation favored by the appellant, contrary to the appellant's convictions and beliefs. (R. 5-6)

To further carry out this work, the association uses its executive director as a registered lobbyist.[18] Ten per cent of the time of the executive director is devoted to lobbying on behalf of the association.[19]

Registration as a lobbyist and reports of lobbying activities are required only if there is an attempt "personally and directly to influence any member of the legislature. . . ." Wis. Stats. § 13.70.

The procedures of the association in the field of lobbying are set forth in a resolution adopted by the Board of Governors on June 12, 1957 which is printed on pages 42a to 46a of the Jurisdictional Statement. The Wisconsin Supreme Court commended the association for the adoption of this resolution. (R. 41-42) Under the resolution the board may delegate its prerogative to take positions on legislative matters to the committee on legislation, the president of the association, or to the association's legislative council. (page 44a, Jur. Stat.) The Legislative Counsel is required to register as a lobbyist and to screen "all legis-

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[18]Minutes of Executive Committee, Jan. 24, 1959. The Wisconsin Supreme Court, in its opinion below took "judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956." (R. 72) Whatever constitutes a noticeable fact in the court below must likewise be a noticeable fact in the United States Supreme Court. **Adam v. Saenger** (1938) 303 U. S. 59, 63.

[19]Report of State Bar of Wisconsin dated June 6, 1960, and filed with the Wisconsin Secretary of State on June 7, 1960. This report may be judicially noticed. **Wis. Truck Owners Ass'n v. Public Service Comm.** (1932) 207 Wis. 664, 667, 242 N. W. 668, 674.

lative proposals" with the aid of committees and sections. (pp. 44a-45a Jur. Stat.)

In the opinion of the Wisconsin Supreme Court, below, judicial notice was taken of all of the legislative activities of the association and the court held that they are all related to "the administration of justice, court reform, and legal practice." (R. 72)

Some of the legislative activities are reflected in the minutes of the Board of Governors and the Executive Committee wherein it appears that the following types of legislation were supported or opposed. Proposals affecting the time for filing mechanics lien claims[20], supreme court justice salaries[21], a constitutional revision of the court system,[22] the pay of attorneys in the armed services[23]; the pay of attorneys in state service[24]; a revision by the legislature of the court system[25], a legal defender bill[26]; a bill affecting the right of courtesy[27]; supervision of intervivos trusts[28]; employment of law clerks by the Supreme Court[29]; venue for workmen's compensation cases[30]; repeal of integration of the bar[31]; a constitutional change permitting increase of

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[20]Board of Governors Minutes, Oct. 31, 1959.

[21]Ibid, February 21, 1957.

[22]Ibid, Feb. 21, 1957.

[23]Ibid, Sept. 13, 1957.

[24]Ibid, June 11, 1958.

[25]Ibid, Feb. 18, 1959.

[26]Ibid, April 10, 1959.

[27]Ibid, April 10, 1959.

[28]Executive Committee Minutes, Dec. 12, 1958.

[29]Ibid, Dec. 12, 1958.

[30]Ibid, Dec. 12, 1958.

[31]Ibid, May 16, 1959.

judicial salaries during terms of office[32]; a proposal to elect Supreme Court justices by districts[33]; a family law bill which prohibits remarriage in certain circumstances and makes it a felony for an attorney to start certain actions[34]; a special appropriation of funds to the legislative council[35]; a comprehensive revision of the federal law relative to tax liens.[36]

The Board of Governors adopted and carried out the recommendations of a special committee on federal legislation which recommended that there be a sub-committee of the standing committee on legislation.

> ". . . to deal with Federal legislation affecting the practice of law, or lawyers as a class, or the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals or the creation of new Federal courts or judgeships affecting this state and comparable subjects; such sub-committee to acquaint itself with pending bills in that field, follow their progress in a general way, take steps to notify its members of the State Bar of the pendency, contents and progress of important bills which have a substantial chance of passing, and to recommend action by the State Bar with reference thereto."[37]

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[32]**Ibid,** May 16, 1959.

[33]**Ibid,** June 10, 1959.

[34]**Ibid,** June 12, 1959.

[35]**Ibid,** May 13, 1960.

[36]Board of Governors Minutes, Dec. 11, 1959. Preparatory for the 1961 session of the legislature, the chairman of the legislative committee urged each section and committee chairman to forward to the legislative committee all drafts and proposals so that they will be ready in time for the 1961 legislature, and stated that a review is being made of all 1959-60 legislation which failed of passage. Board of Governors Minutes, July 22, 1960.

[37]Board of Governors Minutes, Dec. 11, 1959.

The public relations program includes promotion of a ladies' auxiliary (R. 6), publication in newspapers and pamphlets of informative articles on legal subjects (R. 78-79); and ". . . preparation and distribution of news releases covering the activities of the State Bar. . . ." (R. 79)"

Integration caused the income of the association to be doubled from $45,000.00 to $90,000.00. (R. 4)

The principal publication of the association, "The Wisconsin Bar Bulletin," prints papers and articles suggesting changes in the laws of the State of Wisconsin and the United States, biographical articles, articles discussing the present status of laws of the State of Wisconsin and the United States, advertisements of books, publications, trust services, life and health insurance and a variety of other matters. (R. 4-5)"

Payment of Dues Under Protest

In March, 1959, the appellant paid to the appellee, under protest, the 1959 dues required by the State Bar Rules. (R. 6, 47-48) This action was brought to recover said dues on the ground that the coercion by the rules of the Wisconsin Supreme Court to pay such dues violated the Fourteenth Amendment to the United States Constitution and certain state constitutional provisions. (R. 6-7)

"The expected expenditure for this program in 1960 is $3500 and the expected receipts $2000.00. Board of Governors Minutes Dec. 11, 1959. See also the Statement of Receipts and Disbursements for 1959 p. 47a, Jur. Stat.

"The June, 1957 issue of The Wisconsin Bar Bulletin, at page 57, for example, published a recommendation of the Military Law Section that compulsory teaching and study of the fundamental aspects and differences between the democratic system of government and the communistic systems be established in the state school systems.

Determinations of the Courts Below

On the demurrer to the Complaint, the Circuit Court held that no cause of action was stated on the ground that there is no right to practice law but only a privilege. The court held that the deprivation of a privilege does not deprive one of a constitutional right. (R. 62)

On appeal, the Wisconsin Supreme Court held:

(1) That the constitutional guarantee of freedom of association does not include the freedom not to associate. (R. 69-70)

(2) The right to practice law is not a right but a privilege subject to regulation so long as an unconstitutional burden is not imposed or due process is not denied. (R. 71)

(3) That the public welfare will be promoted by securing and publicizing the composite judgment of members of the bar of the state on measures directly affecting the administration of justice and the practice of law—that the general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. (R. 72)

(4) That when the court attempted to balance the public interests against First Amendment freedoms it found no interference with appellant's rights of free speech, assembly or petition. (R. 74). "The public interest . . . far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues. . . ." (R. 75)

(5) That the "State Bar" is a public agency which may be compared to the Judicial Council created by the 1951 Wisconsin Legislature. (R. 75-76)

(6) That the question of whether the creation of integrated organizations results in usurpation of power which in a democracy are exercised by parliament and by the courts "with resulting curtailment of the liberties of the people. . . ." ". . . is hardly pertinent with respect to the issue of constitutionality. . . ." (R. 76)

SUMMARY OF ARGUMENT

I. The Rules for Integration of the Bar Unjustifiably Infringe Upon the Right of Free Association.

The declaration in the United Nations Universal Declaration of Human Rights that "No one may be compelled to belong to an association" is inherent in the guarantees of liberty in the United States Constitution.

It is not cliche, as the Wisconsin court stated, to say that freedom of association includes a right not to associate as well as a right to associate.

From the beginning of this country, the right to freely move in and out of associations has been basic. The American Revolution was an ideological revolt as well as a struggle for independence—a revolt against many European practices such as the compulsory guild system.

In 1789 anyone would have been met with incredulity if he had asserted that government in this country could compel a man to belong to an organization which regulated the growth of his beard and the cut of his dress if he is to keep his job, as was the case with the English Inns of Court.

The people in the United States deliberately took a course which was distinct from that of the English. It cannot be said that the United States Constitution approved prevalent English practices.

The framers of the Bill of Rights expected that the concepts of liberty and property contained in the due process clause would have the broadest possible meaning. Madison maintained that a man had a property in his rights to his conscience, to his opinions and to the free use of his faculties which could not be curtailed by arbitrary restrictions, exemptions or monopolies.

Tocqueville, in his observation of Democracy in America, wrote that no legislature can attack the right of associati n without impairing the foundations of society.

The right of free association which had previously been protected by the United States Constitution as against federal action, became protected as against state action upon the adoption of the Fourteenth Amendment. The United States Supreme Court, on many occasions, has held that the Fourteenth Amendment protects the right of free association. In *Railway Employees Dept. A. F. L. v. Hanson* (1956) 351 U. S. 225, the court did not discuss or pass upon the right of free association. If it did pass upon the right of association, it was in error in not determining whether there was such a compelling and overriding interest in government that it became necessary to invade the right.

The right of free association extend to political, economic and religious matters. Indeed, the right extends into every field of human interest, just as does the right of speech and assembly. A person has a fundamental right

of "freedom of movement" in and out of associations with only the rarest of limitations.

The case where a man is forced to support an association with his money should be as rare as the case where he is forced to aid it with his speech. Only the gravest abuses endangering paramount interests permit an invasion of the right of free association. Mere legislative preference and beliefs are insufficient.

The Wisconsin Supreme Court gave as its reasons for integration the fact that attorneys are mere holders of a privilege, that the integrated association is a state agency, such as a judicial council, that membership in the voluntary asscoiation had become static, that integration would bring about a registration of lawyers, and that it is in the public interest to have the views of lawyers through their representatives expressed upon legislative matters. None of these reasons justifies invasion of the right of free association.

Under our system the practice of law is a right and not a privilege. This rights exists not only because of the right of a person to choose his own calling but also because it is essential for the protection of the rights of people to due process of law that they have an untrammelled choice of attorneys. The choice must be that of the accused or the litigant. The choice cannot be in the hands of the government.

However, whether the practice of law is a privilege or a right, the state cannot manipulate it so as to deprive those who are practicing law from their guaranteed freedoms.

Compulsory membership in and support of the association cannot be justified on the ground that the association becomes a state agency or a legislative committee, such as a judicial council. If it is such an agency or committee, it is because of the very compulsion which is at issue. In any event, it cannot be classified as a committee. The Court itself calls it an "association." Surely it is not a committee of Congress on the ground that it seeks to influence the course of bills in Congress, nor is it a committee of either the legislature or the court. The court stated that the association is to be free and independent.

The fact that the membership in the voluntary association had become static shows only a legislative preference. The lack of a current list of attorneys is no justification when registration can be accomplished through regular channels as through the office of the clerk of the court.

A striking answer to the court's assertion of a public interest in what the lawyers believe about legislation affecting the judiciary and the practice of law is the court's express refusal to grant a request that a poll be taken to determine what the lawyers think about the courts' own legislation compelling membership in the bar association.

Integrated bar associations are political associations—political parties. The principles of the State Bar of Wisconsin, as well as other integrated associations, in seeking improvement in judicial administration and reform in "substantive" laws relating to the practice of law, cover a wide field of endeavor. A major reason for requiring support of the association is that without such support proposals for reform and changes would not be adopted.

The danger of compelling membership in and support of any associations cannot be over emphasized. The precedent formed by compulsory associations of attorneys is extending into the fields of many different callings.

Instead of constituting a compelling reason for invading the rights of free association, the very purpose stated by the Wisconsin court as a reason for its action is a compelling reason why the constitutional right of free association should not be invaded.

II. The Compulsory Bar Unduly Invades the First Amendment Freedom of Free Speach.

The Wisconsin Supreme Court sustained the compulsory bar on the ground that it is in the public interest to secure and publicize the opinions of the majority of the bar on questions relating to the practice of law and the administration of justice. It held that the public and the legislature are "entitled to know" the stand of the profession on such matters and that the compulsory bar can obtain the opinions more effectively than a voluntary bar. The court further found no invasion of freedoms saying the plaintiff was as free to speak as he was before the compulsory membership and the compulsory payment of dues.

First Amendment freedoms are in fact restricted. The member who wishes to remain silent cannot do so because by the mere fact of his compulsory membership and compulsory dues he has supported the stand of the majority. And if he disagrees with the majority he cannot remain silent and retain a free conscience. True he may resign, but the price—his profession and livelihood—is too high for a

free conscience. Thus the right *not* to speak is substantially impaired.

The rights of the member who wishes *to* speak are also invaded. If his views are contrary to the majority, his voice is stilled at least to the extent that it is less effective because of the forced amplification of the voice of the majority. Mass voice replaces our system's emphasis upon and the dignity of the individual voice.

And, the voice of the individual who wishes to speak is stilled by a more subtle force. The amplified majority voice broadcast through the Board of Governors of the bar, becames the "official" or the "orthodox" voice. A dissident must either remain silent on a matter contrary to his convictions and probably thereby become identified with the majority, or speak and become unorthodox. This tends toward discouragement of the exercise of freedoms. So the voice of the one who wishes *to* speak is minimized by the mass voice, and the voice of the dissident tends to become silent because of the disinclination to be unorthodox.

The public, too, is denied First Amendment freedoms. It is entitled to be free *from* the "securing and publicizing" by the government of the opinions of any group on any subject. The marshalling of private opinions for public use is not the business of our government. And private opinions are not the subject of public muster.

Absent the most compelling circumstances, the government is not in the least concerned with what one thinks or with an individual's opinion on any subject.

This case, then, involves, in effect, forced affirmation of opinion, or, as an alternative, an unfree conscience or a

sacrifice of one's profession. Forced affirmation is rarely sustained by this court. And here the "end" is opinion itself.

The public interest here is not even meager, much less compelling. No great evil or danger is involved; no stoppage of public obligations or functions. Only that the "majority voice" will be for the public good.

And the compulsory bar asssociation, in fact, is *not* in the public interest. If it tends to still the voice of those not in the majority, as surely it will, the public interest will suffer.

ARGUMENT

I. THE RULES FOR INTEGRATION OF THE BAR UNJUSTIFIABLY INFRINGE UPON THE RIGHT OF FREE ASSOCIATION GUARANTEED BY THE FOURTEENTH AMENDMENT.

A. The Holding of the Wisconsin Supreme Court That the Fourteenth Amendment Does Not Guarantee Freedom Not to Join Associations is Erroneous.

1. *Since the Beginning of This Nation the Right to Freely Move In and Out of Associations Has Been Deemed to Be a Basic Right Which May Not Be Impaired By Government.*

The Wisconsin Supreme Court disagreed with the appellant's assertion that the right not to belong to an association is protected by the Fourteenth Amendment. It rejected the statement in *Pappas v. Stacey* (1955) 151 Me.

36, 117 Atl. 2d 497, 500, that "Freedom to associate of necessity means as well freedom not to associate. . . .", as "cliche." (R. 70)

The framers of the United Nations Universal Declaration of Human Rights, however, deemed the right not to join to be coextensive with the right to join. Article 20 of said declaration provides:

> "1. Everyone has the right to freedom of peaceful assembly and association.
>
> "2. No one may be compelled to belong to an association."

A statement in the Virginia Declaration of Rights adopted on June 12, 1776[40] which is substantially copied in Section 22, Article I, Wis. Constitution, says that ". . . no free government or the blessings of liberty can be preserved to any people but . . . by frequent recurrence to fundamental principles."

We submit that the history of our nation shows that the American Revolution was an ideological revolt as well as a struggle for independence—a revolt which made it clear to the people at the time that compulsory membership in organizations was not a part of the American system.

In the middle ages craft guilds, with compulsory membership as "the first rule," flourished throughout Europe.[41]

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[40]Rutland, Robert Allen. **The Birth of The Bill of Rights, 1776-1791.** The University of North Carolina Press (1955) Appendix A.

[41]Grant, J. A. C., Univ. of Cal. **The Gild Returns to America,** Vol. 4. The Journal of Politics, pp. 303-309.

Corresponding to the craft guilds were the Inns of Court, which where the compulsory organizations for lawyers."

Freedom from the compulsory guild system was a much sought after fundamental right by the latter part of the 1700's.

Louis XVI, in 1776, gave freedom to "trades and professions" declaring that the "allurement of these fiscal advantages . . . concealed the immense injury they did to industry and their infraction of natural rights. . . ."

The edict stated that the illusion had

> ". . . extended so far that some persons asserted that the right to work was a royal privilege which the King might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all." . . . He, therefore regards it "as the first duty of his justice, and the worthiest act of benevolence to free his subjects from any restriction upon this inalienable right of humanity." Quoted by Justice Field in the dissenting opinion joined by Justices Chase, Swayne and Bradley in *Slaughter House Cases* (1873) 16 Wall. 36, 110, 21 L. ed. 395, 419.

The compulsory guild system did not secure a firm foothold in the American colonies.[42] By the same token, the compulsory Inns of Court did not take root in the American colonies, although there was a tendency just prior to

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[42] Pound, Roscoe, **The Lawyer from Antiquity to Modern Times** (1953) pp. 99-100.

[43] **Grant, supra, note 41, page 309.**

the revolution to have bar meetings and some lawyers clubs in the New England area." A hostility toward organizations of callings existed." French ideas were preferred to things English."

Among the declarations in the Virginia Declaration of Rights of 1776 was the statement "That the people have a right to uniform government; and therefore no government separate from, or independent of *Virginia* ought to be erected or established within the limits thereof."[1]

This declaration is to be contrasted with the statement of the appellee that the "integrated bar" is more appropriately called "The Self-Governing Bar,"[2] and with the statements of the court below that within the realm of the rules and by-laws the court is devoted ". . . to the ideal of a free and independent bar." (R. 47, 73)

Any one were to state to a member of the first session of the United States Congress that a free government could establish a compulsory guild system or some compulsory Inns of Court, he would be met with incredulity.

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[1]**Pound, supra,** note 42, pp. 164-172. The son of John Jay, related that there was an agreement among lawyers in New York not to take into their offices as clerks any young man who intended to enter the profession and that Jay's father took measures to secure a legal education for his son in London. By the time Jay was ready to study law, however, the agreement was abandoned and he studied in a New York law office. William Jay, **The Life of John Jay** (1833) Vol. 1, p. 14.

[2]**Ibid,** p. 177.

[3]**Ibid,** 181. France unselfishly without hope of gain had supported the American revolutionary cause to such an extent that the financial difficulties caused thereby led immediately to the Revolution of 1889. Guthrie, William D. "America's Debt to France—the Most Unalienable Gratitude" (New York City 1916) p. 9.

[4]**Rutland, supra,** note 40, Appendix A.

[5]Motion to Dismiss Appeal, p. 16.

Congressman Sedgwick, of Massachusetts, had such a reaction, on August 15, 1789, when the First Amendment was under consideration. The right of assembly, he said, was a "self-evident unalienable right" that to include such a right in a declaration of rights was like declaring ". . . that a man should have a right to wear his hat if he pleased, that he might get up when he pleased and go to bed when he thought proper . . ." and that it was derogatory to the dignity of the house to descend to such "minutiae" ". . . in a government where none of them were intended to be infringed."[10]

Such was the feeling as to the rights of liberty which existed in this country at the same time that a man's job could be taken from him in England unless he belonged to an association which regulated the growth of his beard and the cut of his dress.[11]

The people who forged the United States Constitution and the United States Bill of Rights deliberately took a course which was distinct from the English. The rights of conscience were no part of the inherited English law. The colonists went beyond their forebears in drafting laws and constitutions after 1775. The Americans of 1776 drew on a rich background of knowledge accumulated from England ". . . but in going through their hands it was fused with newer ideas and the results of their own experiences. . . ."[12]

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[10] 1 Annals of Congress, p. 759 (1834).

[11] See Appellee's Motion to Dismiss, page 13.

[12] Rutland, supra, note 40, page 12.

As was stated in the argument of prevailing counsel in *Ex parte Milligan* (1866) 4 Wall 2, 66-67,

> ". . . our fathers . . . determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new government. Of all the great rights already won, they threw not an atom away. The went over *Magna Carta*, the *Petition of Rights*, the *Bill of Rights*, and the rules of the *common law*, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. . . ."

This court stated almost twenty years ago:

> ". . . Ratified as it was while the memory of many oppressive restrictions on the enumerated liberties was still fresh, the First Amendment *cannot reasonably be taken as approving prevalent English practices.* . . ." *Bridges v. California* (1941) 314 U. S. 252, 256. (Emphasis added)"

Again it is stated in *Kingsley Corp v. Regents of N. Y.* (1959) 360 U. S. 684, 698, (concurring opinion) that British law and British practice ". . . have little relevance to our problem. . . ."

The law of England is not "specially favourable to free speech or to free writing." For example, the denial of the truth of the Scriptures by anyone educated in Christianity

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"As in the case now before this court, the Bridges case involved an allegedly common law court practice.

". . . is by statute a criminal offense entailing very severe penalties. . . ."[9]

Although the first eight amendments to the United States Constitution specified certain rights, those rights which were not specifically named were not thereby excluded.[10] A guarantee of the right of liberty and property, in the broadest of terms, was inserted in the Fifth Amendment (and later in the Fourteenth Amendment)—the due process clause. *DeJonge v. Oregon* (1937) 299 U. S. 353, 364.

The framers of this provision did not expect that the concepts of liberty and property referred to therein would have a narrow meaning. On the contrary, they expected it would have the broadest of meaning—that it would protect the full range of individual rights. Madison, the "father" of the Bill of Rights, regarded property as not merely land or goods or money. He said that man has a property in his opinions and the free communication of them, in the safety and liberty of his person and in the free use of his faculties. A man may be ". . . said to have a property in his rights. . . ."[11]

Madison stated that the power of the government to pay public debts and enforce private debts ". . . can give no title to invade a man's conscience, which is more sacred

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[9]Dicey, A. V. **Introduction to the Study of the Law of the Constitution** (6th Ed. 1902, London) pp. 236, 241-242.

[10]Madison was concerned about an enumeration. He said ". . . my own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. . . ." **Letters and Other Writings of James Madison,** published by Order of Congress (1865) Vol. 1, pp. 421-424.

[11]**Letters and Other Writings of James Madison** (1884) Vol. IV, pp. 478-479 —Essay on Property, dated March 27, 1792.

than his castle . . . ,"[9] and that ". . . is not a just government . . . where arbitrary restrictions, exemptions and monopolies deny to part of its citizens that free use of their faculties and free choice of their occupations. . . ." If there be a government, Madison stated, which ". . . violates the property which individuals have in their opinions, their religion, their possessions and their faculties . . ., such a government is not a pattern for the United States."[10]

Madison, in referring to the monopolies and restrictions upon the use of one's own faculties must have had in mind the European guild system.

Ideas similar to those expressed by Madison are found in proposals by the (1788) conventions of Virginia, New York and North Carolina of a Bill of Rights for the United States which would guarantee the enjoyment of life and liberty and the pursuit of happiness. The conventions of Virginia and North Carolina would add the phrase ". . . with the means of acquiring, possessing, and protecting property. . . ."[11]

The protection of liberty and property in the Bill of Rights adopted by the respective states and the United States was intended to invalidate government acts compelling a man to belong to a guild as a condition for the use of his faculties.

From the beginning of this country, freedom *not* to join an association, as well as freedom to join an associa-

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[9] Ibid.

[10] Ibid.

[11] The Federalist, edited by Paul L. Ford (1898) pp. 635, 639, 646.

tion was an inherent and inalienable right protected by the Constitution of the United States and of the several States.

Tocqueville in his observation of democracy in America stated: "The right of association . . . appears to me almost as inalienable in its nature as the right of personal liberty. No legislature can attack it without impairing the foundations of society. . . ."[9] He said, the members of European associations ". . . respond to a watchword, like soldiers on duty. . . ." while in America ". . . [n]o one abjures the exercise of his reason and free will. . . ."[10]

There were, however, threatened invasions of the freedom of association. One occurred in 1794 when a large number of the members of Congress became upset with the "Democratic Societies" and were considering a resolution censuring them, much as a modern day congress might employ an attorney general's "list" for purpose of censure. Madison was greatly alarmed at this proposed governmental interference and stated that the "citadel" of the liberties of the people is menaced."[11]

The threats to freedom were repelled.

> "Freedom of private association was a value built sturdily into our habits of life. This was the fact that gave vitality to constitutional declarations of rights of assembly and petition. . . ."[12]

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[9]Tocqueville, Alexis De, Democracy in America, translated by Henry Reeve, Esq., Revised by Francis Bowen (5th Ed. 1862), Vol. I, Chapter 12, p. 248.

[10]Ibid. pp. 250-251.

[11]Letter of James Madison to Thomas Jefferson, Nov. 30, 1794; Letters and Other Writings of James Madison (1884) Vol. II, p. 22. Compare Joint Anti-Fascist Refugee Comm. v. McGrath (1951) 341 U. S. 123.

[12]Hurst, James Willard, Law and the Conditions of Freedom in the Nineteenth Century United States, p. 35.

2. *The Right of Free Association Is Protected From State Action By the Fourteenth Amendment.*

The guarantee of freedom of association contained in the First and Fifth Amendments is prohibited from state encroachment by the Fourteenth Amendment. See *United States v. Hall* (C. C. S. D. Ala. 1871) Fed. Case No. 15, 282, Circuit Judge Woods presiding, holding that the rights guaranteed by the first eight amendments were embraced by the Fourteenth Amendment. The ideas expressed in the *Hall* case were carried into the dissents of four justices in the *Slaughter House* case (1873) 16 Wall. 36, 83-131; the concurring opinions of four justices in *Butchers' Union etc. Co. v. Crescent City, etc. Co.* (1883) 111 U. S. 746, 754-760; and the opinion of the entire court in *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 589-590. See also the dissent of Justice Harlan in *Patterson v. Colorado* (1907) 205 U. S. 454, 463-466.

The United States Supreme Court has on numerous occasions protected the right of freedom of association against state action.

In *Fiske v. Kansas* (1926) 274 U. S. 380, it held invalid a state law penalizing the solicitation of persons to become members of a workers industrial union.

In *Staub v. Baxley* (1958) 355 U. S. 313 the court held that a city could not license solicitation for membership in an organization.

In *NAACP v. Alabama* (1959) 357 U. S. 449, 462, the court held to be invalid a state statute designed to cause an association to reveal the names of its members on the

ground that inviolability of privacy in group associations may be indispensible ". . . to preservation of freedom of association. . . ."

In *Bates v. Little Rock* (1960) 361 U. S. 516, the court treated freedom of association on the same plane as the right of assembly; the concurring opinion expressly stating that freedom of assembly includes freedom of association.

In *Watkins v. United States* (1957) 354 U. S. 178, 182, the court stated in reference to congressional inquiries that ". . . First Amendment freedoms of speech, press, religion or political belief and association [cannot] be abridged. . . ."

In *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 250, four members of the court stated in reference to state legislative inquiries that the right to engage in ". . . political . . . association . . ." is enshrined in the First Amendment and that ". . . Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. . . ."

In *Konigsberg v. State Bar of California* (1957) 353 U. S. 252, 273, the court held that a state cannot select its lawyers ". . . in such way as to impinge on the freedom of political expression or association. . . ."

In *Schware v. Board of Bar Examiners* (1957) 353 U. S. 232, 239, the court stated that a member of the Republican party cannot be excluded from the practice of law merely because he is such a member.

In *Wieman v. Updegraff* (1952) 344 U. S. 183, 191, the court held that the state could not make the mere fact of "association" determinative of whether a teacher may be

employed by the state. The court stated "... To thus inhibit individual *freedom of movement* is to stifle the flow of democratic expression and controversy at one of its chief sources. . . ." (Emphasis added)*

3. *The* HANSON CASE *Did Not Pass On the Right of Free Association.*

In *Railway Employees Dept. A. F. L. v. Hanson* (1956) 351 U. S. 225, the court had under consideration a federal statute which legalized agreements requiring persons to support an association as a condition to their right to be employed by parties affected by the agreement. The court, while discussing the right of one to be employed, did not discuss or pass upon the right of free association. It simply treated the right to employment as a property right which may be regulated under the police power.

If the *Hanson Case* did decide that there was no violation of the guarantees of freedom of association in that case, we submit that the holding should be reconsidered; for it would appear to be contrary to the entire tenor of thought existing at the time of the adoption of the United States Constitution and Bill of Rights. Furthermore, if it made such a decision it erred in not determining whether there was such a subordinating compelling interest on the part of the government so as to permit it to invade the right of free association. *NAACP v. Alabama* (1959) 357 U. S. 449, 463.

*See, however, the opinions of a divided court in Uphaus v. Wyman (Nov. 14, 1960 #336) 29 L. W. 4027; Uphaus v. Wyman (1959) 360 U. S. 72; Barenblatt v. United States (1959) 360 U. S. 109; Fleming v. Nestor (1960) 363 U. S. 603 wherein it appears from the dissenting opinions tha the use of censure by the government is curtailing said "freedom of movement." See also page 38, supra.

4. *The Right of Free Association Extends Into All Fields of Human Interest.*

The right of association extends to political, economic and religious matters. *NAACP v. Alabama* (1959) 357 U. S. 449, 460-461. Included within economic matters are matters relating to one's own occupation. This was the right protected in *Fiske v. Kansas* (1926) 274 U. S. 380. Indeed, the subjects of free association are every bit as extensive as that of free speech, with respect to which it is held that such rights ". . . are not confined to any field of human interest. . . ." *Thomas v. Collins* (1945) 323 U. S. 516, 531. Cf. *Cammarano v. United States* (1959) 358 U. S. 498, 513-514 (concurring opinion).

5. *Conclusion*

In conclusion, it is submitted that it is not "cliche" to say that if a man has a "right" to wear a hat, he must necessarily have a right not to wear it. If he has a right to speak, he necessarily has a right not to speak. If he has a right to support or join an association, he has a right not to do so. To say otherwise is to translate rights into requirements.

The Fourteenth Amendment guarantees the right of freedom of association with respect to every field of human interest. Freedom of association of necessity means that each person has the option of determining whether he shall associate *or shall support* an association.

A person has a fundamental right of "freedom of movement" in and out of associations. *Weiman v. Updegroff, supra,* 344 U. S. p. 191.

Essentially, this is what Judge Cooley had in mind when he said that it is not a proper function of government to require attendance upon the sports of the majority, the political meetings of the majority or the church of the majority."

It is respectfully submitted that the Supreme Court of Wisconsin was in error in determining that the right not to be compelled by government to support an association is not guaranteed by the Fourteenth Amendment.

B. There Is No Justification for Invasion of the Freedom of Association In This Case.

1. *Only the Most Unusual and Compelling Circumstances Justify Invasion of the Right of Free Association.*

The case where a man is forced by the state to aid an association with his money should be as rare as the case where he is required to aid the association with his speech.

As in the case of assembly and speech, the rule with relation to freedom of associations should be that ". . . Only the gravest abuses, endangering paramount interests give occasion for permissible limitation. . . ." *Thomas v. Collins* (1945) 323 U. S. 516, 530.

". . . Mere legislative preferences or beliefs. . . ." *Schneider v. State* (1939) 308 U. S. 147, 161, or "conserving

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"Story's Commentaries on the Constitution of the United States (5th ed.) (1891) Vol. 2, Chapter XLVII by T. M. Cooley, Section 1939, p. 689.

of desirable conditions," *Cantwell v. Connecticut* (1940) 310 U. S. 296, 308 ". . . encouragement to loyalty. . . ." *Spieser v. Randall* (1959) 357 U. S. 513, 527-528, or public aims which are merely important, *Buchanan v. Warley* (1917) 245 U. S. 60, 81, are not sufficient to justify infringement of First Amendment freedoms.

There must be a substantive evil that arises ". . . far above public inconvenience, annoyance or unrest. . . ." *Terminiello v. Chicago* (1949) 337 U. S. 1, 4.

In short, in order to sustain the encroachment upon freedom of association, the state must show ". . . a subordinating interest which is compelling. . . ." *Bates v. City of Little Rock* (1960) 361 U. S. 516, 524.

The state has the "heavy burden" of demonstrating that the invasion is justified. *Burstyn v. Wilson* (1952) 343 U. S. 495, 504.

The Wisconsin Supreme Court has given five reasons why it should compel all attorneys to belong to the bar association, namely:

(1) That attorneys are merely holders of a privilege as officers of the court. (R. 70-71)

(2) That the integrated association is an agency of the state, much as a judicial council. (R. 75)

(3) That membership in the voluntary association has become static and a large minority has refused to become associated with the association. (273 Wis. 281, 283, 77 N. W. 2d 602, 603)

(4) That the court has no current list of attorneys. (273 Wis. 281, 284, 77 N. W. 2d 602, 604)

(5) That the public has an interest in what the composite judgment of attorneys is on a broad range of public policy matters. (R. 72, 75)

Each of these reasons is hereinafter discussed. It is submitted that whether taken singly or all together they do not constitute a compelling subordinating reason for invading the right of free association.

2. *Attorneys Are Entitled To Constitutional Protection of Freedom of Association As Well As Other Persons.*

a. The court below justified its action, in part, on the ground that the practice of law is a privilege.

The inference may be drawn that the court below was of the opinion that there is little in the way of constitutional prohibitions affecting its action, since the practice of law is not a right but only a "privilege" as attorneys are "'. . . essentially and primarily . . . officers of the court. . . .'" (R. 70-71) For this reason the court appears to say that only the most general limitations apply to its regulations. An example given is the burden of unconscionably high dues. (R. 71, 74-75)

b. Integration of bar associations is widely justified on the ground the practice of law is only a privilege.

The idea that the practice of law is merely a privilege and that there are very little, if any, constitutional rights

with respect to any rules or laws that may require persons to act in a certain way as a condition for retaining the privilege, has frequently been advanced as the reason why integration of bar associations is valid. See the holding of the Circuit Court below (R. 62); *Ayres v. Hadaway* (1942) 303 Mich. 589, 6 N. W. 2d 905, 907-908. *Petition for Integration of Bar* (1943) 216 Minn. 195, 12 N. W. 2d 515, 518; *In re Scott* (1930) 53 Nev. 24, 292 P. 291, 295.

The "father" of the integrated bar, Herbert Harley, stated that a lawyer is merely a ". . . privileged officer of the state . . ." who has no ". . . no right under natural law, or under common law or under any constitution, to be a lawyer. . . ." ;[11] and that the state can restrict to any extent the number of lawyers, can forbid a union of lawyers, and can discharge lawyers at the end of any annual term.[12]

c. The practice of law should not be described as a privilege under a constitutional government such as that in the United States.

In this country it is wholly inappropriate to refer to the practice of law as a "privilege."

Perhaps more than any other calling, attorneys are essential to our way of life.

The name "attorney" which is used so much in the United States, contrary to other countries, is symbolic. An

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[11]Vol. 8, Journal Am. Jud. Soc., (Oct. 1924) p. 74.

[12]Harley, Herbert "Bar Integration Is a National Movement," Vol. 8, Law Society Journal, pp. 80, 88 (May, 1938).

attorney is an agent—not of government, but of the private individual who seeks his help.

This principle is written into the Wisconsin Constitution which provides that "Any suitor, in any court of this state, shall have the right to prosecute or defend his suit either in his own proper person, or by an *attorney or agent of his choice.*" (Art. VII, sec. 20, emphasis added) It is to be emphasized that the attorney or agent is of the *choice of the suitor—not the government.*

This principal is an unfailing part of the due process clauses of the Fifth and Fourteenth Amendments. This court unanimously held in *Chandler v. Fretag* (1954) 348 U. S. 3:

> ". . . Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through *his own counsel was unqualified.* . . ." (348 U. S. p. 9)
>
> ". . . *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.* . . ." *Powell v. Alabama* (1932) 287 U. S. 45, 69, quoted in the *Chandler case, supra,* p. 10.

The only persons who can effectively vindicate the constitutional rights of litigants[*] to employ counsel of their own choice are those who have gained reasonable educational and character qualifications to act as an attorney.

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[*]Compare **NAACP v. Alabama** (1959) 357 U. S. 449, 459-460.

Even those courts which use the term "officer of the court," are careful to qualify the term by saying that an attorney is not an officer[4] of the state. *Ayres v. Hadaway* (1942) 303 Mich. 597, 6 N. W. 2d 905, 908.

In *In re Galusha* (1921) 184 Cal. 697, 698, 195 Pac. 406, the court stated that ". . . attorneys are not public officers but are engaged in a private profession. . . ."

In *Ex Parte Yale* (1864) 24 Cal. 241, 243-244, the court held that an attorney ". . . is not an officer in the constitutional sense of the term, and does not hold a public trust. . . ." And is subject to regulation ". . . subject to the same limitations as in the case of any other business or profession. . . ."

In *Cammer v. United States* (1956) 350 U. S. 399, 405 the court held that an attorney ". . . is engaged in a private profession, important though it be to our system of justice. . . ."

Indeed, because of the importance to "our system of justice" it necessarily has to be primarily a private profession. The right to follow "any lawful calling, business or profession . . . is a distinguishing feature of our republican institutions." *Dent v. West Virginia* (1889) 129 U. S. 114, 121.

An attorney cannot at the same time be an arm of the state or subject to the whim of the state or its agencies, and wholly and effectively guard the rights of a citizen of

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[4]It seems incongruous to regard attorneys as public officers when they need not be residents of the state. (R. 8)

lesser knowledge who comes to him for help. He cannot serve two masters.

The practice of law is an important constitutional right —not a privilege. Cf. *Royall v. Virginia* (1886) 116 U. S. 572, 583.

d. The right of an attorney to freely associate is not dependent upon concepts of right or privilege to practice.

Regardless of whether practice of law is a right or privilege, such practice cannot be regulated so as to deprive attorneys of constitutional freedoms. *Ex Parte Garland* (1867) 4 Wall. 333, 379-380; *Schware v. Board of Bar Examiners* (1957) 353 U. S. 232, 238-239; *Green v. McElroy* (1959) 360 U. S. 474, 492. See also *Frost Trucking Co. v. Railroad Comm.* (1926) 271 U. S. 583, 593-594.

In the *Garland case* the court stated the legislature may prescribe qualifications for the "office" of attorney ". . . as it may . . . prescribe qualifications for the ordinary avocations of life. . . ." (pp. 379-380); but it cannot be used as a means of "punishment"* for an act which is not otherwise punishable because of constitutional provisions.

In the *Schware case* the court refrained from determining whether the petitioning attorney had been denied the right of free political association (353 U. S. p. 243, note 13), but on the general question of whether a valid qualifi-

*In the case now before this court, the penalty of loss of occupation if the association is not supported is much greater than fine of many thousands of dollars.

cation was required of him, it held that it made no difference whether the practice of law is a right or privilege—that it certainly was not a matter of grace. (353 U. S. 239, note 5)

In conclusion, it is respectfully submitted that there is no reason for saying that attorneys have less constitutional rights of freedom than those persons in other professions and callings.

2. *Constitutional Rights of Freedom of Association May Not Be Invaded By Describing the Integrated Association As a State Agency Or An Arm of the State.*

The court below described the integrated association as an agency of the state and compared it with the state Judicial Council. (R. 75)

It was intended by the Wisconsin Supreme Court that the integrated bar association be a continuation of the voluntary association. (*Supra* pp. 16-17)

The only substantial difference in the association before and after integration is the compulsory feature. (R. 5) This is true throughout the country:[70]

> ". . . The outstanding characteristic of the integrated bar is that all lawyers who engage in the practice are compelled to become members and pay an annual fee, either as a result of statutory requirement or by rule of the Supreme Court. . . ." Barkdull, Howard L., "Methods of Strengthening Bar Associations," 35 Jour. Am. Jud. Soc. (June, 1951) 9, 13.

[70]Giles, Clarence F., An Analysis of the Integrated Bar, 17 Albany Law Review, pp. 231, 235 (1953). Wicker, William, 21 Tenn. Law Rev. 708 (1951).

The integrated bar association is described as an "association" throughout the Rules and By-laws more than 60 times. Section 1, Rule 1, of the Rules provides that all persons licensed to practice law in the state are "organized *as* an association." (R. 7) (Emphasis added)

To say that the integrated bar association is an agency of the state is merely to make the fact of compulsion the reason for its validity.

If a judicial council is a valid creation by the legislature, it is because it is in the nature of a committee of the legislature. An association organized along the lines of a calling which seeks changes by Congress, the legislature or the courts (*Supra* 16 to 22) can scarcely be considered as a committee of Congress or of the legislature or of the court, particularly when Congress, the legislature and even the court does not supervise its activities. (R. 46-47, 73) Cf. *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 255. To call the association a state or federal committee is, again, merely to make the fact of compulsion the reason for its validity.

4. *The Fact That the Voluntary Association's Membership Had Become Static and the Fact That the Court Had No Current List of Attorneys Are Not Overriding Reasons.*

In the opinion announcing its intent to "integrate the bar," the Wisconsin court noted that previously it had advocated wholehearted support of the "voluntary association," but that the membership of the voluntary association has been static and that ". . . a substantial minority

of the lawers in the state *are not associated* with the State Bar Association. . . ." *In re Integration of Bar* (1956) 273 Wis. 281, 283, 77 N. W. 2d 602, 603. (Emphasis added)

Obviously the court felt that it should compel the minority to become "associated" with the association.

Another reason given was that "integration" will accomplish the registration of all lawyers now practicing in the state. 273 Wis. pp. 284-285, 77 N. W. 2d p. 604.

These reasons do not measure up to the importance required for overriding a basic constitutional liberty.

Requiring a person to become associated with an association simply because not all persons who are eligible have joined is nothing more than a mere legislative preference or belief.

Registration of lawyers is not a compelling subordinating interest which requires compulsory membership in an association, when it can be easily accomplished through regular channels, as through the office of the Clerk of the Supreme Court.

5. *A Belief That the Public Is Entitled to Know How Attorneys Feel On Legislative Proposals Is Not a Compelling Reason Justifying the Invasion.*

a. The court below stated that the public is entitled to know how a majority of the attorneys feel on a great variety of public questions.

The Wisconsin court, in the opinion announcing its intent to "integrate" the bar association, 273 Wis. p. 283, 77 N. W. 2d 604, cited *Petition of Florida State Bar Association*

(Fla. 1949) 40 So. 2d 902. In that case, the court held that the purpose of bar integration ". . . is not discipline" for unethical conduct, but to alert the Bar to professional and public responsibility. . . ." (p. 908)

The Florida court pointed to the California State Bar as a good example, stating that it had a public relations program and ". . . in matters improving the administration of justice, the integrated bar of California prepares and fosters bills in the Legislature. . . ." (p. 905), and that "Bar integration grew from a felt necessity *for an organization that could speak for the profession in esse.* It is not a compulsory union but a necessary one to secure the *composite judgment* of the bar on questions involving its duty to the profession and the public. . . ." (p. 908). (Emphasis added)

The Wisconsin court in the instant case gives the same reason for compelling lawyers to become associated with an association of lawyers as the Florida court did, again citing the Florida case. The Wisconsin court stated:

> "We are of the opinion that public welfare will be promoted by securing and publicizing the *composite judgment* of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of legislation. . . ." (R. 72) (Emphasis added)

The court ". . . has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with

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". . . [T]he principle object of whole bar organization, and the most impelling justification for its accomplishment is not discipline. . . ." Webb, F. W. C., **Whole Bar Bar Organizations—A Necessity,"** 29 Journal Am. Jur. Soc. 38, 43 (August, 1945).

respect to legislation affecting the administration of justice and the practice of law. . . ." (R. 74-75)

b. The court below felt no need to learn what a majority of the attorneys felt about a compulsory bar association.

A striking rebuttal of any assertion that the claim of a need to have public expression of the views of a majority of the lawyers of the state with respect to matters affecting the administration of justice and the practice of law, is that the court felt no need to have public expression of the views of the majority of the lawyers of this state as to whether there should be an integrated bar. Although it was strongly urged that a poll be taken of the lawyers on this question, the court refused to have one conducted on this question, saying:

". . . Such poll, of course, would be informative but would not be determinative. Responsibility for creating and continuing the integrated State Bar of Wisconsin belongs to the court and its continuation must always rest in the judgment of the court. . . ." (R. 45-46)

If there is a compelling need to have the views of the lawyers on other questions relating to the courts, why wasn't there a compelling need to have the view of the lawyers on integration?

The fact is that there is no compelling need to have the "composite judgment" of attorneys on matters of pub-

lic policy. There is only a desire which is shared by some under some circumstances and is not shared by others.[72]

c. The intended effect of integration is to increase the influence of the association upon the legislature and the people in carrying out the aims and principles of the association.

Those of independent minds who dislike the bar association and for what it stands need not participate except for putting their names on the rolls and making the required payments. (R. 74-75) However, the very fact that the association has the additional names and the additional money, and thus has the additional attorneys associated with it, places it in a powerful position with respect to influencing the people and the legislature in advancing the purposes of the association. These purposes, which may be called its aims and principles, are to improve the administration of justice[73] to safeguard the proper professional interest of members of the bar and to promote the science of jurisprudence and law reform. (R. 5, 8)

The advantage of additional influence resulting from integration is universally urged as a primary reason for integration. Illustrative statements follow:

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[72] A majority of the lawyers, voting on the question, voted against an integrated bar association in Minnesota and in Arkansas. See **Petition for Integration of Bar** (1948) 226 Minn. 578; 34 N. W. 2d 157, and **In re Integrating the Bar** (1953) 222 Ark. 35, 259 S. W. 2d 144. Integration has also been turned down by the courts in Montana, Tennessee and Massachusetts. See **In re Unification of Montana Bar Association** (1939) 107 Mont. 559, 87 P. 2d 172; **In re Unification of Bar of This Court** (1947) 119 Mont. 494, 175 P. 2d 773; **Re Petition for Rule of Court Activating, Integrating and Unifying the State Bar** (1955) 199 Tenn. 78, 282 S. W. 2d 782 (In Tennessee the legislature passed an act purporting to prohibit integration). **Integrated Bar** (1947) 321 Mass. 747, 74 N. E. 2d 140. The movement met defeat in the legislative field in New York. Giles, Clarence F., **"An Analysis of the Integrated Bar,"** 17 Albany Law Review, pp. 231, 239 (1953).

[73] Of course, what one group or one person believes to be justice or an advancement of justice does not necessarily coincide with the ideas of others

(1) ". . . It is obvious that an integrated bar would have a great deal more persuasive force with legislatures than now obtains. . . ."[7] ". . . [W]ithout the membership and potential participation of every lawyer in determining bar policies, the organization can never make a declaration which binds the entire profession or which obligates the profession, . . ."[8]

(2) Along with financial strength ". . . is the element of importance which is even greater, that . . . the bar is in a position to speak with a unanimous voice for all members of the profession. . . ."[9]

(3) The first advantage of the integrated bar over the unintegrated association is its ". . . influence on other agencies of government that the ordinary bar association can never have. . . ."[10]

In carrying out its aims and purposes the association seeks to change or to prevent change in the organic law of the state as well as in statute law. Its proposals may extend to anything relating to the judiciary, one of the three major divisions in government. Under the heading

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[7]**Harley**, Herbert, Vol. 8, **Journal American Judicature Society** (Oct., 1924) p. 72.

[8]**Ibid.** p. 88.

[9]**Barkdull, H. L., "Methods of Strengthening Bar Associations,"** 35 Journal of Am. Jud. Soc. (June, 1951) p. 13. By sheer force of weight, rather than mere argument it is hoped to overcome the resistance of legislators. For example, the April 23, 1960 Minutes of the Executive Committee of the State Bar of Wisconsin contains the following statement with respect to two acts desired by the association:

"The State Bar is firmly on record in support of both of the above measures, and the Executive Director was instructed to devote his full attention to attempting to secure their passage."

[10]**Winters**, Glenn R., Vol. 39, **Journal Am. Jud. Soc.** (Feb., 1956) p. 142.

of proposals relating to the practice of law" the association goes extensively into "substantive" fields. Even in the supposedly innocuous field of "procedure" we find that lawyers may be made felons if they start certain actions which existed at common law and are now prohibited. *Supra*, p. 21.

A publication of the State Bar of Wisconsin entitled "Your State Bar in Action" (Feb., 1959) states:

> ". . . the State Bar is vigilant in analyzing legislative proposals to see that both the interests of the public and the professional interests of the lawyers are not jeopardized by the passage of bad legislation. . . ." The State Bar is constantly at work at ". . . judicial reform, legislation and constitutional amendments, adding and revamping courts, providing adequate judicial salaries and retirement plans and constant revision of the rules of pleading, practice and procedure. . . ." (page 10)

It has been authoritatively stated that:

> "Every State Bar studies and proposes legislative reform in substantive fields affecting legal practice. . . . [E]very State Bar has one or more committees which regularly recommend legislation to the state legislature.
>
> "The largest State Bars have many such committees and produce many legislative proposals.
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> ". . . California, Wisconsin, Washington and a few other states employ full-time lobbyists during sessions of the state legislature. . . ."[7]

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[7]Madison stated ". . . it may be repeated with the oracular sanction of Cicero, that there is no branch of knowledge which may not be involved in legal questions. . . ." Letter to Richard D. Cutts, Sept. 12, 1835, Vol. IV, **Letters and Other Writings of James Madison** (1884) p. 384.

[7]**Glaser, William A., The Organization of the Integrated Bar** (Aug., 1960) pp. 22-23. This work was prepared by the Bureau of Applied Social Research, Columbia University, for the New York State Bar Association and the Columbia University School of Law.

"Every State Bar proposes improvements in the administration of justice. . . . Adoption of the proposals will require action either by the Supreme Court or by the state legislature."[79]

In order to further promote the administration of justice, many integrated bar associations, actively participate in the field of judicial selection, attempting either to influence the governor or the electorate as the case may be.[80] In order to further promote the aims of the association, some integrated associations make public relations expenditures the largest item in the budget.[81]

The influence of the integrated association has been successfully used with respect to the veto power of a governor.[82]

d. Integrated bar associations are political parties.

Integrated bar associations are political associations—political parties. The name applies regardless of whether the association merely seeks public approval and legislative adoption of a "Code of Civil Procedure" or whether the association engages in a broad range of activities, as does the Wisconsin association. (*Supra*, pp. 17-22)

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[79] **Ibid**, p. 24. See also **Barkdull, "Methods of Strengthening Bar Associations,"** Vol. 35, Journal Am. Jud. Soc. (June, 1951) p. 11.

[80] **Glaser, supra,** note 78, p. 25.

[81] The California association's 1959 expenditure on public relations was $80,000.00. **Ibid.** p. 27. One field where integrated bar associations drastically limit their activities is in the field of legal aid. ". . . . In practice, most legal aid is performed by voluntary bar associations and by other private organizations located in cities. . . ." **Ibid.** p. 27.

[82] See "Michigan State Bar Success" 25 Journal Am. Jud. Soc. (April, 1942) p. 170 where it is stated: ". . . The governor has been advised in respect to signing or vetoing bills, and in every instance has followed Bar counsel." (Emphasis in the original)

Whether the program of the association includes abolition of trial by jury, or bar association appointment of judges, or changing the number of members on either the state or federal supreme court, or changing rules of evidence, or revising property or tax laws or modifying the privilege against self incrimination or other legislative and constitutional proposals, or influencing the appointment or election of judicial candidates, the principle is the same.

A political party is an association of men which seeks to have certain ideas enacted into law. It is primarily a matter of principles and aims that characterizes a party. If candidates for office are endorsed, it is for the purpose of advancing such aims. Illustrative definitions of a political party follow:

> ". . . a political party here, as elsewhere generally, is a voluntary association of voters who are desirous of promoting a common political end, carrying out a certain line of public policy. . . .". *Schafer v. Whipple* (1898) 25 Colo. 469, 55 Pac. 180, 182.
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> ". . . The political parties which I style great are those which cling to principles more than to consequences; to general, and not to especial cases; to ideas, and not to men." Tocqueville, quoted in *Kelso v. Cook* (1916) 184 Ind. 173, 110 N. E. 987, 995.
>
> "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the *prevalence of certain political principles or beliefs* in the public policies of government. As rivals for popular favor they strive at general elections for the control of the agencies of the government as the means of providing a course for the government

in accord with their political principles. . . ." *Waples v. Marrast* (1916) 108 Tex. 5, 184 S. W. 180, 183. (Emphasis added)

It has even been held that a group which has no basic principles but merely advocates the election of various men is not a political party. *State ex rel. Preiss v. Seibel* (1922) 295 Mo. 607, 246 S. W. 288, 295.

That the State Bar of Wisconsin comes within the above definition is without question. It has certain aims and principles and a certain line of public policy which it desires and seeks to have carried out by the government. Even though, as of now, it apparently does not advance candidates for judicial or other office, the lack of candidates does not deprive it of its status as a political party.

Not only is the association a political party but it is a party organized along the lines of class.

e. The acts compelling membership in bar associations constitute a precedent for other types of "integrated" associations.

The far reaching effects of compelling membership in associations, particularly political associations, cannot be over emphasized. This is especially true when the judiciary and the lawyers take an active part in forming the precedent. Once established it becomes very difficult to get rid of the system—the lawyers are in control of the legislature and the courts and exercise a powerful influence throughout our society and set examples for others.

Compulsory bar associations have already served as a precedent for an integrated dental association and for many

other types of coercive measures designed to enhance the position of certain associations and to discourage practice by those who are not members of the association."

Acts compelling membership in bar associations constitute the advance guard of a movement to take the power of government from the representatives of the whole of the people and vest it in associations of classes and callings. While state legislatures had begun in the last quarter of the nineteenth century to delegate regulation of practice to ". . . private societies of artisans or professional men and often to provide that such private groups might nominate or recommend the appointment of public officials, in charge of their regulation . . .,"[10] no sustained movement in that direction had occurred until the launching of the movement for compulsory bar associations.

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[9]Oklahoma adopted an integrated dental association act which was deliberately patterned after the integrated bar act. **Grant, supra,** note 41, pp. 323, 321. See Oklahoma R. S. 1951, Title 59, sec. 221, et seq. In the State of Washington members of the medical disciplinary board are elected by medical license holders. Rev. Code of Wash. sec. 18.72.050. The South Dakota State Nurses Examining Board is appointed from lists of names submitted by the South Dakota State Nurses Association, S. D. Code 1960, sec. 27.0903. Members of the South Dakota Board of Funeral Directors must be selected from candidates nominated by the South Dakota Embalmers and Funeral Directors Association. S. D. Stats. code 1960, sec. 27.1402. The North Carolina Board of Dental Examiners are appointed by the North Carolina Dental Society, Gen. Stats. of N. C. 1958, sec. 90-22. Four out of 9 members of the North Carolina State Board of Health are elected by the Medical Society of N. C. Gen. Stat. of N. C. 1958, sec. 130-4. The society has the right to remove for cause any member appointed by it. Sec. 130-5. In Alabama the Medical Association of the State of Alabama is made the State Board of Health. Code of Alabama 1940, title 22, sec. 1.

[10]**Hurst, James Willard, Law and the Conditions of Freedom in the Nineteenth Century United States** (1956) pp. 87-88.

Now, associations are "legislatively launched and put on their own."[45] They are both political and economic."[46]

The advocates of integrated bar associations openly assert that a return to a system such as the middle age compulsory guild system should be accomplished not only for attorneys but for other professions as well."[47]

Pound, concerned about the unionization of teachers and "closed shops for higher learning" "in an era of bigness on every side," about "absorption of the profession in the Service State," and about the servant of a government bureau who is prevented from ". . . freely applying his

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[45]**State v. Harris** (1940) 216 N. C. 746, 6 S. E. 2d 854, 858, the court, in holding invalid an act for the regulation of dry cleaners which created a board the majority of which were required to have been in the dry cleaning business for 5 years, stated:

"Statutes regulating trades and occupations by delegation of government power to boards and commissions formed largely of the groups affected, intended primarily to control the personnel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations ranging from the learned professions to the ordinary trades. . . .

"No independent administrative supervision is provided over these organizations. No report of their activities is made to any responsible branch of government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own."

Compare the statements of the Wisconsin court endorsing a "free and independent" integrated bar. (R. 46-47, 73)

[46]In Italy, in the 1920's and 1930's, ". . . In order to carry on business or get a job each individual is compelled to become a member or at least pay dues to his syndicate. . . . It is these compulsory corporations that have taken the place of parliament. They are both political and economic. . . ." Commons, John R., **Institutional Economics** (1934) p. 883. Commons was convinced that the basic freedom in America was the right of "free association." He felt that it made this country stronger both economically and politically than European countries. **Ibid.** pp. 901, 902.

[47]**Gilb, Corinne L., Self-Regulating Professions and the Public Welfare, a Case Study of the California Bar** (An unpublished thesis presented in partial fulfillment of the requirements of the degree of Doctor of Philosophy, Radcliffe College, Cambridge, Mass., May, 1956) pp. 1-31, 272. Said thesis is a part of the library at Radcliffe College and is on loan to the Wisconsin Historical Library.

chosen field of learning and exercising his inventive faculties and trained imagination in his own way . . .," inconsistently urges integration of the bar as "a mission of first importance," because we will be turned back to ". . . some of the universal ideas which we once mistakenly called the Dark Ages . . . and to the Middle Ages, when men had . . . ideas of doing things for the glory of God and the achievement of justice and not solely toward competitive individual acquisition. . . ."[46]

Pound overlooks the fact that his ideals, or those of any particular group, as to Justice are not necessarily those of others and that it is wholly unconscionable for the state to impose those ideals on others. He forgets that the guilds, almost from the beginning, departed from their avowed purposes and that the prime objects of the guilds became monopoly, restrictions on newcomers, price fixing, restraint on the free development of ideas—not for the glory of God or for Justice or for the Public, but for the financial benefit of the guild members."

William D. Guthrie, who lead the State of New York in rejecting the compulsory bar association idea stated:

"American history teaches us that the men of the extraordinary and scholarly generation of the last quarter

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"**Pound, Roscoe. The Lawyer from Antiquity to Modern Times,** a study prepared for and published by the Survey of the Legal Profession under the Auspices of the American Bar Association (1953) (pp. 358-362)

Compare the statement of **Henry Upsom Sims,** in Proceedings of the 25th Annual Meeting of the Kentucky State Bar Association (1926) p. 86 that **"It is the purpose of this paper to show that class protection has not been sufficiently held in view by American lawyers. . . ."** (Emphasis added)

See also the statement of **Harley** repeating a statement of another "leader of the movement" that they were not afraid of Negro lawyers ". . . when the whole bar has jurisdiction over their conduct. . . ." 8 Journal Am. Jur. Soc. 72, 73 (Oct., 1924).

[46]**Grant, supra, note 41, pp. 305-309.**

> of the eighteenth century who founded the American bar were familiar with the English system of the Inns of Court. . . . But it was undoubtedly realized by them that such a class or caste organization would conflict with the spirit and genius of American institutions as they conceived them. . . ."[40]

C. Conclusion.

The right to freely move in and out of associations is one of the most basic rights of the American people.

It is a right which gives practical effect to the coordinate rights of freedom of speech, press, assembly and petition.

It is an inherent inalienable right secured by the two great Bills of Rights of this country—the First Eight and the Fourteenth Amendments—a right which is a markedly distinguishing feature of this country.

The right of free association is now under attack. The spearhead of the attack is the movement for compulsory membership in associations of attorneys.

The reasons for the attack are not great and compelling. They do not arise above mere legislative desires.

The reason most frequently given shows the great danger caused by the invasion. It is deliberately intended to use the force of the state to compel support of an association in order that the association may influence the people, the legislature, the governor, and the congress to act as the association desires.

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[40]Guthrie, William D., "The Proposed Compulsory Incorporation of the Bar," 4 New York Law Review 179, 223, at page 231 (1926).

The very objective sought infringes upon constitutional guarantees. Cf. *Speiser v. Randall* (1958) 357 U. S. 513, 527.

It is respectfully submitted that the rules requiring all attorneys to associate with the bar association by putting their names on the rolls and supporting it with their dues are invalid because they directly contravene, without justifiable cause, the guarantees of the right of free association made by the Fourteenth Amendment to the United States Constitution.

II. THE COMPULSORY BAR ASSOCIATION VIOLATES THE FIRST AMENDMENT FREEDOM OF FREE SPEECH.

A. The Wisconsin Supreme Court Justified the Compulsory Bar Association on the Ground That the Securing and the Publicizing of the Opinions of Attorneys Is In the Public Interest.

The Wisconsin Supreme Court does not justify the compulsory State Bar Association on the ground that it is protecting the public against the consequences of ignorance, incapacity, deception or fraud on the part of the members of the bar.

The express justification is that the Wisconsin court is:

". . . of the opinion that the public welfare will be promoted by *securing* and *publicizing* the composite judgment of the members of the bar of the state on matters directly affecting the administration of justice and the practice of law. The general public and the legislature *are entitled to know* how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as a State Bar

can perform much more *effectively* than can a voluntary bar association. . . ." (R. 72-73, emphasis supplied)

• • •

". . . However, this court in which is vested the power of the state to regulate the practice of law, has determined that it promotes the public interest to have *public expression* of the views of a *majority* of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same *to be voiced through* their own democratically chosen representatives comprising *the board of governors of the State Bar.*" (R. 75, emphasis supplied)

B. The Wisconsin Supreme Court Erroneously Assumed That the Compulsory Bar Association Does Not In Fact Invade Freedom of Speech.

The Wisconsin Supreme Court assumed that the compulsory bar will not in fact intrude upon the guaranteed freedoms. It said:

"He is as free as he was before to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar." (R. 70)

• • •

"When we attempt to balance the competing interests at stake in this action, *we find no regulation of, or interference with,* any of the plaintiff's rights of free speech, assembly, or petition. . . ." (R. 74, emphasis supplied)

In judging the practical effect on the individual freedoms, it must be remembered that the Wisconsin Supreme

Court anticipates that the compulsory bar will make ". . . public expression of the views of a majority of the lawyers of the state . . . the same to be voiced through . . . the board of governors of the State Bar. . . ."(R. 75) In fact, it is because of such anticipated activity that the court justifies the compulsory bar.

What, then is the plight of the member who wishes to exercise his right *not to speak* or *to remain silent* on a subject upon which the board of governors has acted? He cannot. He has been compelled to take a stand because he must belong to an organization that is expected to take a stand to justify its existence, and because his dues are used toward taking a stand. And that stand may be contrary to his views.

And if his views are contrary to the "majority," he cannot remain silent and retain the conscience that he is entitled to have left alone. His choice is either to resign—at the forfeit of his life profession and livelihood—or he *must* speak. And he must speak in a loud voice in an attempt to offset the opposing voice he has been forced to amplify against his will." Thus, the right "not to speak" is substantially impaired.

And what is the plight of the member who wishes *to speak* but whose views are contrary to the majority?

His rights are impaired because his voice is stilled.

His voice is stilled to the extent its effect is minimized by the amplification of the majority view. The group voice naturally, and contrary to the intents and characteristics of our system, drowns out the voice of the individual. *Am.*-

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*The income of the compulsory bar is double that of the voluntary bar in 1956. (R. 4)

Comm. Assoc. v. Douds (1950) 339 U. S. 382, 443-444. (Concurring opinion)

And the individual's voice is stilled by a more subtle force. The Bar is under the control of the State Supreme Court. The voice of the Board of Governors of the Bar tends to become the "official view," the "orthodox view." So a dissident who wishes to exercise his right of free speech has the choice of remaining silent (with respect to a view that is contrary to his convictions) and thereby probably become identified with the view of the majority, or of speaking and becoming unorthodox.

> ". . . Beyond that there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at a future time. . . ." *Watkins v. United States* (1957) 354 U. S. 178 pp. 197-198.

> ". . . Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Sweezy v. New Hampshire* (1957) 354 U. S. 234, 251.

In testing the validity of an invasion the "discouraging" of the exercise of rights must also be considered. *Am. Comm. Assoc. v. Douds* (1950) 339 U. S. 382, 393.

And the infringement by the compulsory bar is not confined to the freedoms of the members of the bar. It invades the freedoms of the public.

The public has a right to be free *from* the opinions of any group. *Public Utilities Commission v. Pollak* (1951)

343 U. S. 451. And this is especially true if the opinions are "secured and publicized" (R. 72) by the government. The marshalling of private opinion for public use is not the business of our government. Private opinion is not subject to public muster. ". . . The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . ." *Thomas v. Collins* (1945) 323 U. S. 516, 545. ". . . It is not the function of our Government to keep the citizen from falling into error. . . ." *Douds case,* 339 U. S. p. 442. ". . . Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia Bd. of Edu. v. Barnette,* (1943) 319 U. S. 624, 641.

Thus, we submit the compulsory bar of necessity does in fact interfere with First Amendment freedoms. It interferes with the rights of the members of the bar who wish to remain silent as well as with the rights of the members who wish to be heard. And it interferes with the rights of the public who have a right not to be bombarded with a mass voice sponsored by the government.

C. Neither a Governmental Authority Nor the Public Is Entitled to Know the Opinions of Attorneys On Any Legislation.

The Wisconsin Supreme Court is further in error in assuming that "the general public and the legislature are entitled to know" the opinions of a majority of the profession—or of any individual member thereof.

Absent the most compelling circumstances, the government is not in the least concerned with what one thinks or with an individual's opinion on any subject.

In *Reynolds v. United States* (1879) 98 U. S. 145, this court referred to early colonial attempts to tax for the support of groups or sects to whose tenets one could not and did not subscribe. It quoted with approval from a preamble to an early Virginia Act: "That to suffer the civil magistrate to intrdue his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty. . . ." (p. 163); and further quoted with approval Jefferson's statement ". . . that the legislative powers of the Government reach actions only, and not opinions. . . ." (p. 164) The court concluded that "Congress was deprived of all legislative power over mere opinion. . . ." (p. 164)

In *Thomas v. Collins* (1945) 323 U. S. 516, this court stated "This conjunction of liberties is not preculiar to religious activity and institutions alone. The First Amendment gives freedom of mind, the same security as freedom of conscience. . . ." (p. 531) And the concurring opinion in *Spieser v. Randall* (1958) 357 U. S. 513, 535:

> ". . . Today what one thinks or believes, . . . have the full protection of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed 'invert the order of things.' . . . What a man thinks is of no concern to government. . . ." (pp. 535-536)
>
> * * *
>
> "I know of no power that enables any government under our Constitution to become the monitor of thought. . . ." (p. 538)

A similar observation in *American Communications Association v. Douds* (1949) 339 U. S. 382, 444, (concurring opinion) puts it this way:

". . . I think we must let his mind alone."

The Wisconsin Supreme Court justifies the securing and publicizing of the opinions of members of the bar upon the ground that such opinions will be confined to measures relating to the "administration of justice, court reform, and legal practice." (R. 72) Aside from the fact that these terms can cover a wide range of beliefs, on a multitude of subjects, the First Amendment guarantees are not so limited. ". . . The rights of free speech . . . . are not confined to any field of human interest." *Thomas v. Collins* (1945) 323 U. S. 516, 531.

D. Forced Affirmation of Belief or Opinion is Rarely Sustained.

This case involves not only an invasion by way of suppression of speech but involves forced affirmation of beliefs or opinions. A member of the bar, as stated above, cannot remain silent. He is forced, by the mere fact of compulsory membership and compulsory dues, to support a "majority" voice. And he must speak if he disagrees. If he does not, his conscience is not free. True, he may resign. But even so, his conscience cannot be freed because the price—his livelihood, his profession—is too high.

Of course, the First Amendment freedoms are not absolute. Most of the cases illustrative of this fact treat with the *suppression* of speech under circumstances where coun-

tervailing public interest justifies the interference. This public interest, for example, may be to protect against an imminent substantial evil or an imminent substantial danger, or to prevent interference with the discharge of the essential obligations of government. *Schenck v. U. S.* (1919) 249 U. S. 47, 52, and cases cited in *Am. Comm. Assoc. v. Douds* (1950) 339 U. S. 382, p. 398.

However, relatively few cases upholding an infringement of the First Amendment freedoms have involved a forced affirmation of opinion or belief as distinguished from the suppression of the expression thereof. And these few cases have found hard going in the Supreme Court of the United States. It is possible that forced affirmation involves no greater inroad into the First Amendment freedoms than suppression of expression, but as a practical matter attempts to force one to speak are rare and compelling public interests which justify such compulsion are rarer still.

A dissenting opinion in *Public Utilities Comm. v. Pollak* (1952) 343 U. S. 451, in commenting upon the meaning of "liberty," as used in the First Amendment, said:

> ". . . he may not be forced to make an affirmation . . . that violates his scruples. . . ." (p. 467)

West Virginia State Board of Education v. Barnette (1943) 319 U. S. 624, involved a forced affirmation of belief in the form of a flag salute. In holding this an unconstitutional invasion of the First Amendment freedoms, this court said in part:

> ". ... Here, however, we are dealing with a compulsion of students to declare a belief. . . ." (p. 631)

". . . Here it is the State that employs a flag as a symbol of adherence to government as presently organized. . . . It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." (p. 633)

"It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. . . ." (p. 633)

A California statutory prerequisite of non-belief in the overthrow of the government for tax exemption purposes, sustained a similar fate, although upon varying grounds. *Spieser v. Randall* (1958) 357 U. S. 513.

A denial of a license to practice law because of failure to take an oath to support the State Constitution—which provided for a militia—was sustained. *Re Summers* (1945) 325 U. S. 561. Applicant's failure to take the oath was based upon his conscientious belief in non-violence. The decision was not unanimous.

In *Sweezy v. New Hampshire* (1957) 354 U. S. 234, the Court, again upon varying grounds, *reversed* the conviction of one who had refused to answer questions concerning a lecture given at the State University. See *U. S. v. Rumely* (1953) 345 U. S. 41. And in *Watkins v. United States* (1957) 354 U. S. 178 the conviction of a witness who had refused to answer questions before the un-American Activities Committee was *reversed* on the ground that the procedural rights of the witness had not been complied with.

Several cases have involved the validity of forced affirmation as to one's stand on advocacy of overthrow of the government, or as to membership in a party advocating such action. As to teachers: *Adler v. Board of Edu.* (1952) 342 U. S. 485; *Beilan v. Board of Edu. of Philadelphia* (1958) 357 U. S. 399; *Weiman v. Updegraff* (1952) 344 U. S. 183; as to employees: *Garner v. Board of Public Works* (1951) 341 U. S. 716; *Lerner v. Casey* (1958) 357 U. S. 468; and as to a person in a position closely related to the public safety, *Am. Comm. Assoc. v. Douds* (1950) 339 U. S. 382.

None of these decisions was unanimous.

In *Konigsberg v. State Bar of California* (1957) 353 U. S. 252 the court reversed a refusal to grant the applicant a license to practice law. He had refused to answer certain questions relating to his membership in the Communist party. The opinion turned on a conclusion that the record did not support the fact-finding of the lower court. But the Supreme Court observed:

> "If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. . . ." (p. 261)
>
> • • •
>
> "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to infringe on the freedom of political expression or association. . . . It is also important both to society and

the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar. . . ." (p. 273)

E. There Is No Countervailing State Interest to Justify the Invasion of the First Amendment Freedoms.

The Wisconsin Supreme Court determined that ". . . it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to [certain] legislation . . . voiced through . . . the board of governors. . . ." (R. 75).

On the question of weighing the respective interests of the State and the members of the bar, the Wisconsin Court said:

> "When we attempt to balance competing interests at stake in this action we find no regulation of, or interference with, any of the plaintiff's rights of free speech, assembly or petition. . . . The public interest so promoted . . . far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues." (R. 74-75)

Thus, it appears that on one side of the scales the court put the fostering of public welfare by the marshalling of lawyers' opinions on legislation, and on the other side, the payment of dues by the individual member. Apparently the invasion of First Amendment freedoms played no part in the balance.

In any event, under the facts of this case, there is no such compelling public interest as justifies the inroads on the rights of the members of the bar and of the public. This court has often stated that a mere relationship is not

sufficient when First Amendment freedoms are encroached upon.

The so-called public interest here is not protection against a great public evil or a substantial danger to the public. In fact, there is no claim of evil or of danger of any kind. Neither is the public interest here in that category that justifies infringement in order to effectively and in an orderly manner discharge the governmental functions and obligations.

The only public interest asserted here is that it will be for the public good.

As stated above, "mere legislative preferences and beliefs" *Schneider v. State* (1939) 308 U. S. 147, 160, 161, or "conserving of desirable conditions" *Cantwell v. Connecticut* (1940) 310 U. S. 296, 308, or "encouragement to loyalty" *Speiser v. Randall* (1959) 357 U. S. 513, 527-528, or public aims which are merely "important" *Buchanan v. Warley* (1917) 245 U. S. 60, 81, are not sufficient.

In this case we do not have any real ". . . collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State. . . . The sole conflict is between authority and rights of the individual. . . ." *West Virginia State Board of Education v. Barnette* (1943) 319 U. S. 624, 630. In fact, here there is not even a conflict between the authority and the individual, because neither the State nor the public has a right to the individual opinions of the members of the bar on any question of legislation. The "end" sought here is opinion itself, which under the circumstances is no concern of either the State or the public.

And it can well be argued that securing and publicizing the opinions of a majority of the bar is not in the public interest at all. If marshalling such opinions tends to still the voice of the other members, it might well be that the public interest will suffer.

F. Conclusion As To Invasion of Free Speech.

We respectfully submit that the Wisconsin Supreme Court erred in its conclusion that the compulsory bar does not in fact interfere with the freedom of speech. It does so, both as to the rights of the individual members of the bar and as to the rights of the public.

It further erred in assuming that the government has a right to create machinery for the express purpose of "securing and publicizing" the opinions of any group or of any individuals. This is far from consistent with our doctrine that the mind shall be left alone. The legislature and the public is not "entitled to know" what people think.

And there is not even a meager public interest involved here. In fact, absent most compelling circumstances, the public interest demands that the voice of the individual be neither forced nor stilled, and that the public be not subjected to a government sponsored mass voice of any group.

III. CONCLUSION

As stated on pages 28-31 of the Jurisdictional Statement, the question now before this court has not been decided in any court other than the courts below with the possible exception of New Mexico.

Here we have a case of an association composed by its very nature, of the most influential men in the country, in which membership is made compulsory—an association which was created for the purpose of influencing the people, and the legislature and the Congress, and the courts, on matters of public policy.

Here rights of free speech are not only infringed upon, but the very purpose and justification is opinion itself. And machinery is created that in the opinion of the Wisconsin Supreme Court will "much more effectively" do the job. The public is to be subjected to a government sponsored mass voice. The government assumes guardianship on matters of opinion.

We cannot conceive of any invasion of constitutional freedom which has more far reaching consequences, which is of greater danger to the nation, than the invasion now before this court. With compulsory membership in associations organized along lines of class and calling, on both state and national levels, we shall become a tightly regimentated state—a society much different than any ever envisioned by the framers of the Constitution.

It is respectfully submitted that the Supreme Court of Wisconsin was in error in holding that its rules requiring membership in and support of the State Bar of Wisconsin did not contravene the Fourteenth Amendment to the United States Constitution.

We refer to the message of Governor Walter S. Goodland to the 1943 Wisconsin legislature, wherein he refused to approve a bill for an integrated bar association in the State of Wisconsin:

"The liberties we enjoy were only acquired after centuries of struggle. The liberal nations of the world are now engaged in a death struggle for their protection. I would be false to my ideals were I to approve of bill No. 56,S with its denials of individual freedom of action." (Jurisdictional Statement Appendix pp. 41a to 42a)

Although this case arose upon a demurrer to the complaint, judicial notice has been taken by the court below (R. 72) and therefore, necessarily by this court, of the activities of the integrated association. (*Supra* p. 19, note 18)

It is therefore respectfully submitted that the proper disposition of this case is to reverse the judgment of the Supreme Court of Wisconsin and remand the case to it with instructions to reverse the judgment of the Circuit Court for Fond du Lac County, Wisconsin, and to overrule the demurrer, and to enter judgment for the plaintiff against the defendant as prayed in the complaint.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 200

TRAYTON L. LATHROP,
Appellant,

vs.

JOSEPH D. DONOHUE,
Appellee

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF ON BEHALF OF STATE BAR OF MICHIGAN, AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 200

TRAYTON L. LATHROP,
Appellant,

vs.

JOSEPH D. DONOHUE,
Appellee

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF ON BEHALF OF STATE BAR OF MICHIGAN, AMICUS CURIAE

STATEMENT OF POSITION

This brief is respectfully submitted on behalf of the State Bar of Michigan, *amicus curiae*. The State Bar of Michigan will have existed as an integrated organization of the Michigan bar for 25 years on January 1, 1961.

It is our purpose to confine this brief to a discussion of the more important fundamental principles and juridical concepts here involved.

It is our claim that the decision and judgment of the Supreme Court of Wisconsin (R. 65-81) is sound and should be affirmed. We see therein no abridgment of appellant's freedom of speech or association. Nor do we perceive that appellant has been deprived of his liberty or property without due process of law, or that he has been denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

The "rule of reason" applies to all aspects of this case.

RESTATEMENT OF THE QUESTION INVOLVED

Appellant's statement of the question involved beclouds the real issue. The true question, we submit, is whether the dictates of reason, and therefore the Fourteenth Amendment, are offended where the Supreme Court of Wisconsin established by law as a state agency, a self-governing and self-regulating organization of the entire bar of that state, and required payment of a small annual fee by each member of such bar to defray the expenses thereof, for the purposes of aiding the courts "in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the

science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged" (R. 8).

ARGUMENT

1. The legal profession is an indispensable component of our system for dispensing justice under law, and as such has certain public responsibilities.

Attorneys are licensed because of their learning and ability, so that they may not only properly protect the rights and interests of their clients, but be able properly to assist the court in disposing of litigation and otherwise in the performance of its judicial function. They are required to meet higher than ordinary standards of moral character so that as "agents and officers of the court, which they are, they may not bring discredit upon the due administration of the law." *Cobb v. Judge of Superior Court* (1880) 43 Mich. 289.

Indeed, these requirements are essential so that our system for establishing and dispensing justice can be developed to a high point of efficiency and so maintained that the public, upon whose approval it depends, shall have absolute confidence in the integrity, effectiveness and impartiality of its administration. *Preamble, Canons of Professional Ethics of the American Bar Association.*

Self-adulation or not, it is pertinent again to remind ourselves, as did Frankfurter, J. in *Schware v. Board of Law Examiners,* 353 U. S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752, 64 A. L. R. 2d 288, "that all of the interests of man that are comprised under the constitutional guaranties

given to 'life, liberty and property' are in the professional keeping of lawyers." They are in the professional keeping of no other group of individuals to such an extent.

The growth of populations and the changes that are taking place in social and economic philosophies continually spawn new concepts in jurisprudence that threaten constantly to erode the framework of democratic institutions. To cope with these problems, and to provide proper solutions, requires concentration of the manpower of the entire legal profession, with all of the resources of wisdom, discretion, statesmanship and finance that it can muster.

The legal profession, and each member thereof, also have the responsibility for self-regulation as to ~~this~~ their conduct and professional affairs.

It is no exaggeration to say that these are, indeed, "anxious responsibilities." They are responsibilities common to all who are licensed to practice law. They command vigilance, not indifference; action, not silence.

Appellant assumed the sum total of these responsibilities when he took and subscribed to the oath of his office upon his admission to the bar. Presumably he did so by his own volition, without any compulsion or coercion. By so doing, he became associated with the judicial department of his state as a member of the bar. He became an instrument of the judicial process. Indeed, he became an integral and essential part thereof. Is this court disposed in this case to hold that the Fourteenth Amendment gives him the right to shirk an iota of his responsibilities? If so, which may he shirk, and which may he not?

2. Regulation of a state bar through a self-governing and self-financed agency of the state is reasonable.

The juridical device of integration is predicated upon the *de facto* existence of the bar of a state as a defined body of persons with common privileges and responsibilities who are not wholly united. The device, when employed to integrate the bar of a state, implements the conception that all persons who are licensed to practice law in that state are members of the bar of that state by virtue of such license. It is the unification of all of the members of the bar into an integral whole.

At the time this device was employed in Wisconsin, the voluntary Wisconsin Bar Association consisted of a segment of only 68% of the members of the bar of that state (R. 2). It is of no significance bearing upon constitutionality that the structure and purposes of the Wisconsin Bar Association were substantially preserved in the State Bar of Wisconsin. Nor is it of any constitutional significance that the State Bar of Wisconsin is called an "association".

Since the bar as a whole could not function properly as a practical matter without corporate-like capacity to transact its business and carry on its affairs, integration of necessity breathes a semblance of corporate life into the body of the state bar, and equips it with the traditionally American forms and methods of self-government through elected representatives.

Because of the interest of the public in the conduct and activities of the organized bar, and its members, integration is the governmental sanction of the existence of the state bar as a *de jure* public body, and not as a private association, or corporation. The usual constitutional prohibition against the creation of corporations, or associations, by special act, is no impediment. It is generally held

that such prohibition does not apply to the creation or sanction of public or quasi-public bodies,—corporate or otherwise. *Huron-Clinton Metropolitan Authority v. Boards of Supervisors of Five Counties* (1942) 300 Mich. 1.

The governmental act by which integration of the bar occurs may be that of the state legislature, or the state supreme court, or both. If performed by the legislature, it is the exercise of police power vested in the legislature by the constitution to regulate occupations that are affected with a public interest. If performed by the supreme court, it is an exercise of inherent judicial power to supervise the operation of the judicial process, including regulation of the practice of law, and the professional activities and qualifications of those who are privileged to do so; and, by necessary inference, the conduct and activities of the bar as a whole. The judicial sanction is effectual especially where, but not necessarily because, the legislature may have acted to "create" the entity. Nor does the fact that the legislature may, or may not, have acted detract from the right of the court to do so in any event. *Ayers v. Hadaway,* (1942) 303 Mich. 589, 6 N. W. 2d 905.

The power to create, or sanction, corporate-like entities is one of the attributes of sovereignty, which under our form of government is vested in the people, and is exercised by three independent departments of government. Usually, corporate bodies, both public and private, involve political or property rights, or both. For this reason it is generally held that the power to create both public and private corporations is vested exclusively in the legislative branch, as the representatives of the people. Likewise, the creation of administrative agencies with defined corporate capacities and powers, and the imposition of a license fee

for regulation under the police power, are generally legislative functions.

However, the license to practice law, as such, involves no constitutionally guaranteed substantive political or property rights. *Re Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 S. Ct. 1082. It is a privilege granted by the state through its judicial department. Both the issuance and revocation of such license are exclusively judicial functions. Neither has ever been held to be a legislative function. Procedurally, of course, a license to practice law cannot be denied to a qualified person upon grounds that offend the "dictates of reason."

The law is established that the Courts of the several States and the Supreme Court of the United States each are autonomous in determining the privileges, duties and discipline pertaining to the practice of law in each of their respective spheres. As stated by Frankfurther, J. in *Thread v. United States of America*, 354 U. S. 278, 1 L. Ed. 2d, at page 1344:

> "While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court."

The inherent power of the judiciary to license for the practice of law includes by necessary implication the right to regulate all phases of that activity, and to require payment of a reasonable annual fee by the licensee for such purpose. Also, by necessary inference, and parallel with

the legislative function in other cases, the state supreme court possesses sufficient sovereign power to establish an administrative agency under its own jurisdiction and control to aid the court in the administration of justice and to regulate the practice of law; and to equip such agency with the powers and capacities necessary for its efficient and effective operation, without encroaching upon the legislative function.

The Supreme Court of Wisconsin, of course, could not directly supervise the professional affairs of 4,700 members of the bar of that state. Therefore, integration of the bar in that state was merely the recognition by the Supreme Court of Wisconsin that the bar as a whole, when provided with the forms and methods for self-government in relation to the professional affairs and responsibilities of its members, and with corporate-like capacity to transact its business, is the agency best suited to aid effectively in regulating the practice of law, and to perform the other functions that the legal profession as a whole and each member thereof has the responsibility to perform. It was a recognition by that state that the members of the bar, by reason of their superior education and training in the law, are capable of self-regulation under the general supervision of the state supreme court. An association-like entity provides a suitable framework for such an agency.

Is such governmental action unreasonable? If there be any who believes it is, allow us to suggest a familiar alternative that has been held many times not to be.

A state by legislation, certainly could establish a state bar commission, or commissioner, as a state administrative agency for the purpose of regulating the practice of law, including minimum qualifications for admission and grounds for disbarment, and could require each member of the bar to pay an annual license fee for the purposes of

such regulation. Practically all of the states have dealt similarly with doctors, dentists, real estate brokers, architects, engineers, plumbers and barbers, to mention but a few. Much closer, and perhaps more efficient, regulation might be possible through this type of state agency.

Regulation of the practice of law by this means could well include a *requirement* for continued education, in addition to the examination of applicants for admission, and the usual provisions for discipline. Included, also, could well be regulation of the fees and services of lawyers.

It is not uncommon for such state agencies periodically to publish material germane to their respective fields of activity, and to be authorized to appoint advisory committees to recommend matters within their phere of activity for legislative action. Many, also, devote part of the funds at their disposal to public relations activity. The licensees under this type of state agency would be integrated in fact, and in law.

Absent, however, would be the forms and methods of self-government and self-regulation by the licensees that are common to the integrated organizations of the bar, including the one in Wisconsin. Is this court disposed to hold that the dictates of reason, and therefore the Fourteenth Amendment, are offended by the inclusion of these elements in the self-financed, state-created instrumentality for the regulation of the bar? To so hold, we submit, would be to deny that the members of the bar, notwithstanding their superior and specialized education and training in the law, are competent to be entrusted with the responsibilities for self-government and self-regulation.

3. The integrated state bar should be distinguished from the labor union.

It may be of interest to observe that the integrated organization of the bar of a state bears a striking resemblance to the self-financed pre-Nineteenth Century craft guilds. These guilds appear to have been charged not merely with the self-governance of the craftsmen, but with the interest of the craftsmen and the public at large in the craft and its products. Contrary to popular notion, they were not even then the fore-runner of today's workers' or employers' unions whose essential functions have been competitive *ab initio*, moving to monopoly *ante finem*. The craft guilds, in contrast with the modern labor union, were in no way motivated by the collective bargaining concept. They were instead instruments for determining the standards of life, quality and price in a particular field of activity, these standards being enforced, if need be, by the state authority. Stone, *The Province and Function of Law*, page 607, *et seq.*

The craft guild was one of two classes of peace guilds, the other being the neighborhood groups. "Both of these, in time, developed into an approximation of the modern municipal corporation, each exercising minute supervision over those within its jurisdiction, the one dealing with all persons living within a certain territory, and the other with all persons of like occupation residing within a certain territory." *Fletcher, Cyclopedia Corporations*, Vol. 1, p. 5.

The modern labor union, on the other hand, is and always has been a private association of workers. The "closed shop" feature of the typical union contract is strictly a matter of private agreement between the workers and their employer negotiated through the device of collective bargaining by the labor union as the authorized

representative of the workers. By contrast, the integrated state bar negotiates no employment contract with anyone on behalf of its members. It is not an organization primarily motivated by private economic considerations. The integrated state bar exists for the public purposes for which the State Bar of Wisconsin, and the 26 others, were organized.'

The constitutionality of the privately-negotiated "closed shop" agreement, with the consequent exclusion from employment of non-union members, was established in *Railway Employees Dept. A. F. L. v. Hanson* (1956) 351 U. S. 225, 100 L. ed. 1112, 76 S. Ct. 714.

Certainly there can be no valid challenge to the constitutionality of a state requirement, not involving a private contract, that those charged with public responsibilities as members of the bar be excluded from reaping personal benefits from the practice of law if they are unwilling at the very least to pay the small annual license fee imposed for the purpose of enabling the bar as a whole to carry out such public responsibilities.

CONCLUSION

The decision and judgment of the Supreme Court of Wisconsin was neither arbitrary nor capricious, nor hastily formulated. The necessity of establishing the State Bar of Wisconsin as a self-governing, self-financed regulatory agency of that state was under consideration by that court at various times over a period of 15 years, not including its review in this case of what it had done. Such deliberate action did not offend the dictates of reason, and therefore did not violate the Fourteenth Amendment. The decision and judgment of the Supreme Court of Wisconsin in this case should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1960

No. 200

TRAYTON L. LATHROP,

Appellant

v.

JOSEPH D. DONOHUE,

Appellee.

On Appeal from the Supreme Court of Wisconsin

JOINT BRIEF OF KENTUCKY STATE BAR ASSOCIATION AND VIRGINIA STATE BAR, AMICI CURIAE

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JOINT BRIEF OF KENTUCKY STATE BAR ASSOCIATION AND VIRGINIA STATE BAR, AMICI CURIAE

INTEREST OF AMICI CURIAE

The Kentucky State Bar Association and Virginia State Bar join in presenting this brief *amici curiae*. Like the State Bar of Wisconsin, they have a common interest in sustaining the validity of the organized bar in the 26 states of the Union. They are opposed to the position of the Appellant in this cause; and wish to impress upon the Court the importance of the matter in controversy, not only to lawyers of Kentucky and of Virginia, but to the public at large.

This brief, tendered with the consent of both the Appel-

lant and the Appellee, is presented in two basic parts; the first concerning the bar of Kentucky, and the second that of Virginia.

KENTUCKY STATE BAR ASSOCIATION

1.

Kentucky State Bar Association Was Integrated by a Legislative Enactment in 1934, and the Highest Appellate Court in the Commonwealth of Kentucky Has Consistently Held That Integration Comes within the Inherent Power of the Court.

Chapter 30 of the Kentucky Revised Statutes deals with attorneys at law. The integrated bar provision is KRS 30.170, "Court Rules Governing Practice of Law and State Bar." The Act provides:

> "The Court of Appeals shall adopt and promulgate rules:
>
> (a) Defining the practice of law;
>
> (b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;
>
> (c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;
>
> (d) Organizing and governing a Bar Association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the State Bar as a part of the judicial department of the state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in

good standing of the State Bar; and fixing the form of its organization and operation;

(e) Fixing fees upon recommendation of the board of Bar Commissioners, not to exceed ten dollars, to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees."

An unsuccessful attack was made on the constitutionality of this statute in 1946 in the case of *Hobson* v. *Kentucky Trust Company of Louisville* (1946), 303 Ky. 493, 197 S. W. 2d 454, on the grounds that it violated Section 27 of the Kentucky Constitution which divides the state government into three departments, executive, legislative and judicial, and on the further ground that it violated Section 28 of the Constitution, which provided that no one department can exercise the power belonging to one of the other departments. The Court of Appeals, the highest appellate court of the Commonwealth of Kentucky, in deciding the validity of these charges made a statement which is high precedent to the recognition of the validity of the integrated bars.

"The attack is grounded upon the contention that the Legislature in the enactment of our Integrated Bar Act attempted to confer upon the Court of Appeals legislative authority in conflict with Section 28 supra of our constitution. In effect, the attack denies the universally accepted doctrine that the making of rules of practice in courts, as well as out of courts, in matters pertaining to the rights of individuals under the law, is inherently possessed by courts and judges in carrying out the functions of administering the law affecting the rights of persons as between each other and as between them and the government. Such authority is

> universally accepted by the courts as properly embraced within the Judicial Department of the government."

In this opinion, it can be seen that the Kentucky Court of Appeals is acutely aware of its power, regarding the integrated bar, both by statute and by the court's inherent right to make such rules as are necessary to properly govern court procedures and the State Bar Association.

Although no attack has been made in the Commonwealth of Kentucky upon the court's right to impose and determine the amount of bar dues to be paid by each attorney licensed to practice in the Commonwealth, the court's decisions indicate that it would adopt and follow the decision of the Supreme Court of Florida in Petition of Florida State Bar Association (1949) 40 Southern 2d 902. In that case the Florida Court determined that it had the power to require the payment of membership fees as an incident to its power to integrate.

> "If the judiciary has inherent power to regulate the bar, it follows that as an incident to regulation, it may impose a membership fee for that purpose. It would not be possible to put on an integrated bar program without means to defray the expense. We think the doctrine of implied powers necessarily carries with it the power to impose such an exaction."

Here then is a judicial recognition of the obvious fact that it takes money to properly implement the key purposes of an integrated bar, that is the proper administration of justice, adequate standards for admission and continuance of practice by the individual attorney, and the court's obligation to prevent the unauthorized practice of the law.

The integrated bar case is well settled in Kentucky and we would direct the court's attention to the decision in the

case of *Louisville Bar Association* v. *Clark* (1937), 270 Ky. 315, 109 S. W. 2d 619. This was one of the earliest attacks on the validity of the integrated bar act in Kentucky, and the court pointed out the other cases in which it had decided that the integrated bar act was valid:

> "These matters (one of which was the validity of the Act creating state-wide bar association) have been determined by this court in the trial of previous similar cases and decided adversely to respondent's contentions and we need not further discuss those cases. A reference to these cases is sufficient. See Commonwealth, ex rel Ward vs Herrington, 266 Ky. 41, 98 S. W. 2d 53; Commonwealth, ex rel Buckingham et al v. Ward, 267 Ky. 627, 103 S. W. 2d 117; in re Sparks, 267 Ky. 93, 101 S. W. 2d 194."

That the court has the inherent power to require compulsory membership in the association and payment of fees to continue as a member, was clearly stated by the Court in a decision rendered just one year after the effective date of the Integrated Bar Act. *Talbott* v. *Park* (1934), 256 Ky. 534, 76 S. W. 2d 600.

> "Whether or not the Court of Appeals has the inherent power to adopt rules for the organization and regulation of the State Bar is immaterial since if it does not possess that power, the Legislature has clothed it with the requisite power by the act in question."

2.

The Required Membership Fees of the Kentucky State Bar Association Are Used for the Benefit of the Legal Profession and the General Public.

In order to acquaint the court with the specific rules in

Kentucky relating to membership and fees of the Kentucky State Bar Association, we direct attention to certain provisions of the Rules of the Court of Appeals.

> "RCA 3.030 — Members of the bar required to be members of the association. All persons licensed to practice law in this State shall be, and they are, members of the Association."

A reading of these rules demonstrates that although each attorney is compelled to be a member of the State Bar Association, adequate provisions are made for those who are not financially able to pay their dues and those who are intentionally delinquent are given ample opportunity to make a defense. However, the rules are firm in providing that those who do not have a meritorious defense to the payment of dues shall not continue to practice law in Kentucky and their name shall be stricken from the rolls.

In the case of *Dredidel* v. *City of Louisville* (1937), 268 Ky. 659, 105 S. W. 2d 807, the Court of Appeals held:

> "It's (the integrated bar act) only purpose was to prescribe a code of ethics governing the profession and conduct of attorneys in the practice of law, and for the further purpose of establishing a procedure for disciplining, suspending and disbarring attorneys at law, and providing for the organization and operation of a bar association, and prescribing a fee to be paid, not to the state or to the treasurer of the state, but to a select officer of the Bar Association, to be used solely for paying expenses in administering the purposes of the Association. . . . The fee of $2.00 (now $10.00) to be collected, and when collected, under the act, is used entirely to meet the expenses of administering the act, and rules and regulations to be prescribed, adopted and promulgated under the act."

This statement outlines the need for, and the justification in charging membership fees. In order to carry out the purposes of the Bar Association, there must be sufficient funds available.

The Board of Bar Commissioners for the Kentucky State Bar Association, the association's governing body, whose fourteen members are elected by the members of the association, are charged with being the administrative agency of the Kentucky Court of Appeals in carrying out the purposes of the Act. The Board's effectiveness can, of course, be greatly restricted by the shortage of funds. Disciplinary cases require investigations and records can only be prepared by calling on stenographers and court reporters. This, of course, requires money.

3.

A License to Practice Law in Kentucky Is a Privilege Dependent Upon a Condition Precedent of Becoming a Member of the State Bar Association and a Condition Subsequent of Upholding the Association's Standards.

The appellant in this case, in his brief, page 29, contends that "There is no place in the constitutional system of the United States for the idea that any occupation, calling, or profession, is a mere privilege in the absolute control of those temporarily holding the reins of government."

The Kentucky Court of Appeals would not sustain this contention. In the case of *Commonwealth, ex rel Ward* v. *Herrington* (1936), 266 Ky. 41, 98 S. W. 2d 53, at page 56, the Court declared:

> "Their (lawyers) positions as such are not held by inherent right. They are entitled to become such only when they possess prescribed educational and moral

> qualifications. The law maintains that they should continue thereafter to maintain them, and especially must they preserve their moral qualifications. If impairment thereto, or total loss thereof, is permitted to occur, then the judicial or governmental machine becomes impaired and ineffective to that extent and a condition is created when its maintainer should, in the exercise of his power and authority—as well as his duty—make the necessary corrections."

And in the case of *In Re: Taylor* (1949), 309 Ky. 388, 217 S. W. 2d 954, it was stated:

> "A license to practice law in this Commonwealth can be granted in no other way than by the authority of this court. This license, a personal privilege, is burdened with pre-existing as well as subsequent conditions calculated to uphold and maintain the dignity of the court, the ethics of the profession and the welfare of all concerned with the administration of justice."

Even prior to the Integrated Bar Act, the Kentucky courts have held that the right to practice was a personal privilege. *Commonwealth* v. *Richie* (1902), 114 Ky. 366, 70 S. W. 1054:

> "An attorney is an officer of the court, created by the court, and is always subject to the rule requiring honesty and good demeanor toward the court in which he practices his profession."

The fact that in order to acquire this privilege one must become a member of the State Bar Association and thereby subject himself to the courts' and the association's rules of discipline, has long been accepted by the attorneys in the Commonwealth of Kentucky.

To exercise this personal privilege, members of the State Bar Association must initially possess the educational and moral qualifications to be admitted a member of the Bar and to continue to exercise this personal privilege they must continue to maintain the ethical and moral standards and pay the annual bar dues required.

4.

The Effectiveness of the Integrated Bar Surpasses That of a Voluntary Bar and Therefore May Be More Expensive

The appellant, on page 15 of his brief, contends that "power of an integrated bar is ordinarily no greater than of a voluntary group." The appellant obviously makes this assertion to support his contention that there is no real necessity for an integrated bar and that integration, therefore, is an improper imposition upon the individual attorney.

Relative effectiveness of the two groups should not have any real bearing on the constitutional question, but since the contention is made, we would like to point out the erroneous assumption, that is the basis for this assertion. One of the primary examples of the effectiveness of the integrated bar over that of a voluntary bar is the continuing battle being fought against unauthorized practice of law. Where the voluntary local bar association is weak, the unauthorized practitioner finds the public an easy prey.

This illustration was succinctly stated by the Supreme Court of Arizona in its opinion in the case of *In Re: Lewkowitz* (1950), 70 Ariz. 325, 220 P. 2d 229, when it made reference to the period prior to the creation of the integrated bar in Arizona in 1933, the same year of Kentucky's integrated bar act.

"The voluntary state bar organizations in existence

> proved to be impotent to carry on the high purposes and noble aspirations of the legal profession for the simple reason that they were composed only of a small minority of those eligible to its membership. This weakness was readily apparent to the leaders in the legal profession and a program was initiated shortly after the turn of the century to secure the adoption of the principle of a unified bar as a means of correcting the ills existing within the profession. It was a long, hard battle that involved educating both the laity and the individualy lawyer to the necessity for a virile state bar, one that could speak authoritatively, as Charles Evans Hughes expressed it with a 'commanding voice.' "

This pronouncement exemplifies the need for an integrated bar with sufficient resources to combat those who would usurp the practice of law. It is obvious that litigation of this type is expensive, despite the unreimbursed time and labor donated by the attorneys in waging the campaign. This, alone, would be justification for the imposition of compulsory bar dues, but there is another factor that merits consideration by the court.

Local voluntary associations, understandably, can be reluctant to prosecute disciplinary cases against one of their own or to curb the unauthorized practice in their areas when it involves, personal, financial or political friends or connections. The impact of local pressure is no deterrent on the integrated bar acting as the administrative agency of the highest court in the jurisdiction.

It is vitally important to point out that the money and labor are not expended for the sole benefit of the members of the bar, but, on the contrary, for the benefit of the general public. This was ably expressed by the Nebraska Supreme Court in the case of *Neklaus* v. *Abel Construction*

Company (1957), 164 Neb. 842, 83 N. W. 2d 904, a tax case involving the unauthorized practice of law by a layman:

> "This action is taken for the benefit of the lawyers who are duly admitted to the practice of law in this state. As was said by the Supreme Court of Colorado in Bennie v. Triangle Rand Co., 73 Colo. 586, 216 P. 718, it is for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand and the machinations of unscrupulous persons on the other. . . ."

A similar statement can be found in the case of *Washington State Bar Association* v. *Washington Association of Realtors* (1942), 41 Wash. 2d 697, 251 P. 2d 619, where the court declared that it had a duty to protect the public by a proper decree, from the activities of those who, because of lack of professional skill, might cause injury, whether they be members of the bar or persons never qualified for or admitted to the bar. To the same effect is the case of *Pioneer Title and Insurance Company* v. *State Bar of Nevada* (1958), 74 Nev. 186, 326 P. 2d 408, where the court pointed out that the practice of law by others than the members of the State Bar of Nevada was forbidden by statute, NRS 7.600, and that the reason for this statutory provision was not the protection of the lawyer against lay competition, but the protection of the public. It should be noted that these comments are from the state courts in the states of Washington and Nevada, both of which recognize the validity of the integrated bar. Perhaps the courts in these jurisdictions would not have been called upon to incorporate these statements in opinions, had it not been for active integrated bars which were willing to prosecute these actions in an effort to protect the general public.

5.

The Constitutionality of the Integrated Bar Is Beyond Challenge

The appellant, on page 15 of his brief, makes some mention of the failure of the attempt to create an integrated bar act in the state of New York. Certainly the question of membership fees was not in issue. The opposition in New York, as seen by the Hon. Charles Evans Hughes, sprang from two fears. One was that the plan would not work on the grounds that "you cannot overcome the inertia of a great number of lawyers who do not feel their responsibility. . . . You can't legislate into lawyers a sense of their duty. You can't compel them to recognize standards by making them members of a state bar organization."

The second fear that he expressed was, "On the part of the local associations that the less respectable element of the bar, whom they considered unfit for equal participation, would gain control of an inclusive organization." 26 American Political Science Review, 470, 475-476 (1932). These fears, as expressed by the Hon. Charles Evans Hughes, have never materialized in the Commonwealth of Kentucky.

While authorities often differ on any one issue, with equal vigor, we submit that this situation does not exist with regard to the constitutional validity of the integrated bar. We submit that the weight of authority upholding the integrated bar surpasses the contentions of the appellant. We share the view expressed by William Wicker in his article "Integrated Bars", appearing at 21 Tenn. Law Review 708 (1951):

> "Bar integration acts create a relatively new type of organization. Whenever any kind of legislative act creates a new type of organization, there will be law-

yers who will raise the cry of unconstitutionality. Bar integration acts have been no exception. In a number of reported cases able lawyers have contended that the must-be-a-member and the must-pay-dues provisions of integration statutes are unconstitutional. Generally this contention has been based on claims that such a statute is an unconstitutional delegation of authority or that it denies the equal protection of the law or that it is invalid under some other constitutional provision. In all of these cases, the courts upheld the constitutional validity of the bar integration act. Other court controversies have centered around the validity of grants of power to bar associations in regard to the discipline of their members and it has been contended that such a grant of power to a bar association is an invalid delegation of judicial power. This contention has been held repeatedly to be invalid where the final decision to disbar or not to disbar is left to the court; any finding by the bar association being only recommendatory."

During the October term of 1952, in the case of *Re: Disbarment of Abraham J. Isserman* (1953), 345 U. S. 286, 97 L. Ed. 1013, 73 S. Ct. 676, this Court said:

"There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself and, hence, society, as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the court and cannot deter the court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the Court."

While the order of disbarment was set aside two years later, this court, nevertheless, is on record as holding that the practice of law is only a personal privilege.

No integrated bar case raising the question of the validity and dues provision has previously been presented to this Court. However, this Court has, in a measure, ruled on one of the issues raised by the appellant, that of compulsory membership and dues, specifically in the field of labor organizations. In the case of *Railway Employees Department* v. *Hanson* (1956), 351 U. S. 225, 100 L. Ed. 1112, 76 S. Ct. 714, the Court met an argument that a union shop agreement with the necessary association violated the right of association, by holding that no constitutional rights had been jeopardized and specifically referred to the integrated bar in the Court's opinion, on page 238, where this language is found:

> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."

VIRGINIA STATE BAR

There are upwards of 5,300 attorneys at law in the Commonwealth of Virginia. All are members of the Virginia State Bar. More than half are members of The Virginia State Bar Association, a voluntary membership corporation chartered in 1890. Hence Virginia is one of three states in the Union having two bar organizations on the state level. Additionally, there are approximately 60 membership organizations of the bar on the local level, existing in various cities and counties.

The Virginia State Bar is a creature of the Supreme Court of Appeals of Virginia. It is described by the Legislature "as an administrative agency of the Supreme Court of Appeals of Virginia for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Supreme Court of Appeals under this act to a court of competent jurisdiction for such proceeding as may be necessary, and requiring all persons practicing law in this state to be members thereof in good standing." (See 1940 Acts of the General Assembly of Virginia, page 502.) The quoted language is taken from the permissive legislation adopted by the General Assembly in 1938 which authorized the Supreme Court of Appeals to "prescribe, adopt, promulgate and amend rules and regulations * * * (d) Organizing and governing an association to be known as the Virginia State Bar composed of the attorneys at law of this state, * * * (e) Fixing a schedule of fees to be paid by members of the Virginia State Bar for the purpose of administering this act, and providing for the collection and disbursement of such fees; provided, however, that the annual fees to be paid by any attorney at law shall not exceed the sum of Five Dollars ($5.00)." (The maximum or ceiling on dues has since been increased by amendment of the statute to

$10.00.) The Act goes on to stipulate that "all fees collected from the members of the Virginia State Bar, as provided in Section 1 of this Act, shall be paid into the State treasury immediately upon collection and credited to the State Bar Fund. All moneys so paid into the said fund are hereby appropriated to the Virginia State Bar for the purpose of administering the provisions of this act. All disbursements from the said fund shall be made by the State Treasurer upon warrants of the Comptroller issued upon vouchers signed by such officer or officers of the Virginia State Bar as may be authorized, by or in accordance with rules and regulations prescribed, adopted and promulgated by the Supreme Court of Appeals of Virginia so to do." A further provision goes on to prohibit the use of dues towards publishing decisions of the Supreme Court of Appeals of Virginia, or to law magazines or to buying any such publications.

Section 1 of this legislation shows its purpose, at a glance. The General Assembly thereby authorized, and the Supreme Court of Appeals accordingly adopted, a

1. Definition of the practice of law
2. Code of professional ethics
3. Code of judicial ethics
4. System of procedure for disciplining, suspending and disbarring attorneys at law.
5. Organization of the whole bar of the State into the Virginia State Bar and requiring every practitioner to be a member.
6. Schedule of membership "fees," with provision for collection and disbursement thereof.

On October 21, 1938 the Supreme Court of Appeals of Virginia adopted and promulgated the "Rules for the Integration of the Virginia State Bar," which are reprinted in 194 Va. cxliii et seq. The Rules provide that the powers of the Virginia State Bar shall be exercised by a Council composed of 40 members in addition to the President, President-Elect and Immediate Past President, as *ex officio*, each member being elected for a term of three years by the members of the Bar in each of the 34 Judicial Circuits in Virginia, plus 6 members appointed by the Supreme Court of Appeals from the active members of the Bar of the State at large. Rule 9, Part IV, explicitly authorizes Council—

(a) To adopt By-Laws for the Council not in conflict with these rules which shall be effective when approved by the Supreme Court of Appeals.

(b) To recommend to the Virginia State Bar such By-Laws for its government and such amendments of and additions to these rules for submission to the Supreme Court of Appeals as the Bar may see fit.

(c) To elect the officers provided for by these rules.

(d) To fill vacancies in the Council for unexpired terms if there should be a failure for sixty days to elect as provided in Section (6) and to fill vacancies in any office for unexpired terms.

(e) To appoint Committees and prescribe their duties.

(f) To employ such assistants as it deems necessary and to fix their duties and compensation and the compensation of the Secretary-Treasurer.

(g) To make allocations of funds within the amounts available.

(h) To conduct such investigations and make such re-

ports as may be directed by the Supreme Court of Appeals or by the Bar.

(i) To render advisory opinions as provided in Section (10).

(j) To investigate and approve or disapprove publications in the nature of Law Lists as a medium of professional listing by the members of the Virginia State Bar.

(k) The Council may, at its discretion or upon a written request of the majority of the members of the Virginia State Bar or pursuant to a resolution duly adopted at a regular or called meeting, exercise the necessary powers:

To cultivate and advance the science of jurisprudence;

To promote reform in the law and in judicial procedure;

To facilitate the administration of justice;

To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession;

To encourage higher and better education for membership in the profession;

To promote a spirit of cordiality and brotherhood among the members of the Virginia State Bar; and

To perform all duties imposed by law.

The Rules further provide for an Executive Committee of the Council consisting of 9 members, 6 of whom are elected annually and the other 3 of whom are, *ex officio,* the President, President-Elect and Immediate Past President. Among other specific duties the Executive Committee is authorized "generally between meetings of the Council to perform such other duties and functions as are prescribed for the Council in the Rules of Court, except such functions and duties as the Council may reserve to itself or may delegate to other

Committees." A system of 10 District Committees is also established, each comprised of 7 lawyers elected by (but not from) the Council in each Congressional District in Virginia. The primary function of District Committees is to investigate unprofessional conduct and, upon probable cause shown, to file a verified complaint against the practitioner. Upon the filing of such complaint a three-judge court is appointed to try the case, pursuant to Virginia statute. District Committees also have the responsibility of investigating unauthorized practice of the law, and in this connection may petition a proper court to enjoin such misconduct. As an example of the Bar's pursuit of real estate brokers drawing of deeds, see *Comm.* v. *Jones & Robins, Inc.* (1947), 186 Va. 30, 41 S. E. 2d 270. District Committees are further empowered to act in instances of judicial misconduct, under the Rules.

The Rules go on to establish 3 standing committees of the State Bar: the Committee on Legal Ethics, Committee on Unauthorized Practice of the Law, and Committee on Judicial Ethics. Various other special committees have since been established, including the following:

On Cooperation with the Virginia State Bar Association

On Legal Aid and Legal Reference

On Virginia Bar News

On Cooperation with Judicial Council and Conference

On Insurance and Bonds and Clients' Security Fund

On Legal Services to the Armed Forces

On Cooperation with Law Schools

On Cooperation with Foreign Bar Organizations

On Traffic Courts

On Cooperation with Medical Profession

On Commonwealth, City and Town Attorneys

On Professional Prestige

On Bar Headquarters

Additionally, 4 joint committees with The Virginia State Bar Association have been appointed, their membership being limited to members of the Association:

Joint Committee on Public Information

Joint Committee on Legislation and Law Reform

Joint Committee on Continuing Legal Education

Joint Committee on Cooperation with Bar Organizations

The Committee on Continuing Legal Education is noteworthy because, for the first time last year, it was expanded to a membership of 9, of whom 5 are practicing attorneys and 4 are representatives of each of the 4 approved law schools in Virginia. The Virginia State Bar Association and the Virginia State Bar each appropriated $6,250 a year for this Committee, and the Committee in turn has employed a salaried executive director to administer a planned program of continuing legal education across the State. Cooperation with and coordination among the local bar associations in Virginia is an important phase of this Committee's activity. The various seminars and institutes, which are just beginning, will undoubtedly prove popular; registration fees from lawyers in attendance will, it is hoped, make the program self-sustaining in a few years.

All of the Virginia State Bar's various committee reports are to be found in printed pamphlets issued annually, the

last being designated "Twenty-first Annual Report of the Virginia State Bar" for the year ending June 30, 1959. In that volume the report of the Committee on Cooperation with Foreign Bar Organizations is of especial interest because it outlines the "Preliminary Arrangements for the Commemoration of the Advent of Common Law to Jamestown in 1607." The commemoration exercise was held on Jamestown Island on the day after the Virginia State Bar's annual meeting in 1959. It was a significant professional occasion, for which the Bar and its Committee received various awards and certificates of merit, including those from the Valley Forge Freedom Foundation and from the American Bar Association.

The same volume also contains an interesting report of the Joint Committee on Legislation and Law Reform. That report first referred to five subjects which the General Assembly had requested the Virginia State Bar Association and the Virginia State Bar to study. It also discussed several other topics of interest to lawyers, such as certain changes in the divorce statutes, the statutes involving the accounts of personal representatives, and other laws pertaining to wills and administration. Earlier reports of the Joint Committee on Legislation and Law Reform show concentration on topics of the same prosaic professional concern. There has been no lobbying by the organized bar in Virginia; indeed, on this account no representative of the Virginia State Bar has ever registered as a lobbyist, as required by statute. No two people think alike, of course, either in Virginia or Wisconsin. But, it might be asked, could a more apt, more propitious subject than "law reform" be devolved upon any group of people other than lawyers as a profession.

Monthly publication of the Virginia Bar News by the

Virginia State Bar, which is mailed to each member, is indeed a significant and popular activity. Under the editorship of a professor of law at the University of Virginia, the Bar News reports on matters of organized professional activity on the national level, the state level in Virginia, and the local level. The last issue carried, for instance, an article written by a member of the State Corporation Commission of Virginia which dealt with the completion of annual report forms by corporations. Advertising in the Bar News is strictly limited. Nevertheless, special mailing privileges are available, and the net cost of the publication could be measured in pennies to the individual practitioner.

The foregoing outline of the State Bar's activities is intended to explain, not just why the Bar was "integrated" in Virginia but the necessity for its existence in the minds of lawyers and laymen alike. Much could be said of the Councils determination to employ salaried counsel for the Bar, once funds are available, to assist in prosecuting kindred professional infractions across the State; as also to suppress unauthorized practice of the law in matters pertaining to estate planning, taxation, collection agencies, and other fields that are divided jurisdictionally by 10 separate District Committees. The Virginia State Bar Association was and is powerless to act in such matters. The rapidly growing complexity of the practice of law rendered such "membership" organizations obsolete; indeed, it gave birth to the organized Bar. The very existence of the Joint Committee on Continuing Legal Education is a monument to the need—to the reason for the origin of the Virginia State Bar. When its revenues are sufficient for its expenses, the occasion for joint sponsorship, or joint appropriations, from both the Committee's parent organizations will cease. In its organizational stage, however, the Committee requires more funds

than the $10 dues of the Virginia State Bar will allow.

Let us next consider the Virginia State Bar in the background of decided cases in Virginia which recognize the need for its existence and further its expressed aims.

In *Comm. and Va. State Bar* v. *Jones & Robins, Inc., supra,* the Supreme Court of Appeals of Virginia in 1947 made a number of interesting rulings and observations on the "integrated" Bar. For instance:

> "The Virginia State Bar is an organization fully authorized to institute suits and other proceedings it deems necessary to enforce the rules and regulations of the integrated bar. * * *
>
> "* * * In the former case (Richmond Association of Credit Men v. Bar Assn., 167 Va. 327, 189 S. E. 153) Mr. Justice Eggleston, speaking for the Court at page 335, declared 'that the courts have the inherent power, apart from statute, to inquire into the conduct of any person—whether an individual, a law agency, or a corporation—to determine whether he or it is usurping the functions of an officer of court and illegally engaging in the practice of law and to put an end to such unauthorized practice where found to exist.'
>
> "* * * To eliminate these difficulties and afford a greater measure of protection to the public a demand arose to place the responsibility of preparing deeds upon lawyers who by proper training and experience are in better position to perform this important duty. In response to that demand this court was called upon to define the practice of law. This it did, after great and comprehensive effort and intelligent assistance from the leading members of the bar of the State. In formulating the present definition this court possessed a clear and express intent to so define the practice of law as to prevent real estate agents from continuing the practice of writing deeds.

"The Supreme Court of Appeals of Virginia, pursuant to its inherent power and chapter 410 of the Acts of 1938 (Acts 1938, p. 771), adopted rules and regulations, defining the practice of law and prescribing a code of ethics governing professional conduct of attorneys, a code of judicial ethics and other measures, by which the Bar of this State became integrated.

"These rules and regulations were drawn and recommended for adoption by forty able and experienced attorneys, designated as the 'Committee on the Integration of the Virginia State Bar,' and composed of one attorney from each of the then thirty-four judicial circuits, elected by the attorneys practicing in that circuit, and six members from the State at large, appointed by this court. At the first meeting of this committee, held in Lynchburg on June 30, 1938, the responsibility for drafting the rules and regulations to integrate the Bar was divided among five committees of eight members each."

One of the five committees was designated Committee No. 5 and named the Committee on Constitutionality of Plan of Integration and Fees. It was under the chairmanship of a lawyer who was then a member of the Senate of Virginia, later became Governor, and who thereafter attained national prominence. A portion of the Committee's report reads as follows:

"This sub-committee is of the opinion that the inherent power of the judiciary is such as to give to the Supreme Court of Appeals the right and power to integrate the Bar of the State without legislative sanction. Abundant and respectable authority upholds this view.

"However, quite independently of the inherent power of the Court we are of the opinion that the Bar Integration Bill of 1938 is a constitutional enactment and that the plan submitted to the Committee of Forty in

Lynchburg is a valid exercise of the powers conferred upon the Supreme Court of Appeals by the General Assembly with the possible exception of the method originally proposed for handling the funds of the Bar, as to which there is enough doubt to advise or recommend the amendments above stated. In making the recommendation that the rules be amended to provide for deposit of the funds in the State Treasury we have been influenced by an opinion from the Attorney-General of Virginia given under date of July 23rd, which we file with this report, to the effect that in his opinion the Bar Integration Act 'does appropriate the proceeds from the collection of said dues and that same should be paid out on warrants of the State Comptroller drawn upon the State Treasury. . . .'"

The Supreme Court of Appeals in 1952 ruled that the practice of law in Virginia was a privilege and courtesy reserved to persons duly qualified and authorized; in other words, in Virginia a person must "establish his right to exercise the privilege granted him * * *." In *Horne* v. *Bridwell*, 193 Va. 381, 385, 68 S. E. 2d 535, it is said:

"* * * These were conditions precedent to his exercise of the privilege and courtesy accorded him by Virginia law. Those conditions were not matters of empty form. They were of the spirit of the rules adopted to guide the Virginia lawyer in his relation to his client, as thus expressed.

" 'The gravity of the consequences to society resulting from abuses of this relation demands that those assuming to advise or to represent others shall be properly trained and educated, and be subject to a peculiar discipline. That fact, and the necessity for protection of society in its affairs and in the ordered proceedings of its tribunals, have developed the principles which serve to define the practice of law.' (Rules for the Integration of the Virginia State Bar, 174 Va. xviii)"

In 1942 the Supreme Court of Appeals affirmed the suspension of a practitioner's license in *Campbell* v. *Third Dist. Comm.*, 179 Va. 244, 18 S. E. 2d 883. In doing so the court specifically ruled that "the right to practice law is not an inherent right, and even before a man or woman is granted a license it must appear that he or she is a person of high moral character." Constitutional challenge of the statute was likewise denied. Two concurring judges (who were later successive Chief Justices) felt revocation, rather than suspension, proper, adding the opinion that the court had inherent power to enter a final judgment to that effect.

The issue before the Supreme Court of the United States in the instant case is moot in Virginia. This year, when the General Assembly enacted Section 54.50-1 of the Code of Virginia, it became statutory that any licensed attorney at law who fails for two successive years to pay his annual dues forfeits his license to practice. The Code section is qualified by a provision for reinstatement, with penalty. By and large, however, the General Assembly and the Supreme Court of Appeals are in unison in (1) requiring every practitioner to belong to the Virginia State Bar, (2) requiring every member to pay annual dues, and (3) providing for expulsion upon two successive defaults in payment of dues. If there is any question over the validity of the statute setting a maximum or ceiling on dues in Virginia, the opinion has been expressed that it can only be ineffectual because of the Supreme Court of Appeals' inherent power to integrate or regulate the bar without permission or restriction of the General Assembly.

SUMMARY STATEMENT

As has been shown, in both Kentucky and Virginia integration of the bar has brought great benefit not only to the legal profession, but also to the general public. In each instance there has been made possible a necessary and more rigorous enforcement of ethical standards and a greater means of curtailing the activities of unauthorized practitioners.

Experience has shown that these, and other attending gains, could not have been realized had the two bars remained unintegrated. *Were compulsory membership in organized State bars to be held invalid, the resulting damage to the profession and to the public would be severe and clearly without remedy.*

It is submitted that this Court uphold the validity of the integration of the bar of Wisconsin.

Respectfully,

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CERTIFICATE OF SERVICE

I, William H. King, one of counsel for *Amici Curiae* and a member of the Bar of the Supreme Court of the United States, do certify that consent for the filing of this brief has been given, and that I have served upon counsel of record for the appellant and appellee copies of this brief by depositing such copies in the United States Mail on December 19, 1960, with first class postage prepaid, and duly addressed.

WILLIAM H. KING
Of Counsel for *Amici Curiae*

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 200

TRAYTON L. LATHROP, *Appellant*,

vs.

JOSEPH D. DONOHUE, *Appellee*.

On Appeal from the Supreme Court of Wisconsin

Brief for The State Bar of California Amicus Curiae

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Brief for The State Bar of California Amicus Curiae

This Brief is filed for The State Bar of California, *amicus curiae*, with the written consent of the parties to this proceeding.

INTEREST OF THE STATE BAR OF CALIFORNIA

Appellant herein asserts that the establishment by the State of Wisconsin of an integrated bar, with which all lawyers admitted to practice in the state are required to enroll as members and to which they must pay annual membership dues, is an unconstitutional invasion of the

rights of Appellant under the Fourteenth Amendment of the Constitution of the United States. A decision in favor of Appellant herein might cast doubt upon the constitutional validity of the integrated bars heretofore established and now existing in more than half of the other states of the union. As one of the oldest of these integrated bars, and the largest of all in number of members, The State Bar of California thus has a most direct interest in the outcome of this litigation.

The State Bar of California was created in 1927 by the State Legislature (1927 Calif. Stats. Chap. 34, pp. 38-45, now codified, as amended, Bus. and Prof. Code, Secs. 6000-6154). Its validity has been sustained by the Supreme Court of California against a variety of attacks in a series of decisions commencing with *State Bar v. Superior Court*, 1929, 207 Cal. 323, 278 Pac. 432. It is a public corporation (Bus. and Prof. Code, Sec. 6001). It holds property "for essential public and governmental purposes in the judicial branch of the government" (*id.*, Sec. 6008). Its property and any notes or other evidences of indebtedness it may issue are exempt from taxation (*id.*, Secs. 6008 and 6008.2). The Supreme Court of the State has described the governing board of the State Bar of California as "public officers . . . functioning as an arm or branch of this court" (*Chronicle Pub. Co. v. Superior Court*, 1960, 54 Adv. Cal. 546, 563, 354 P.2d 637, 645; *Herron v. State Bar*, 1931, 212 Cal. 196, 199, 298 Pac. 474, 475).

The establishment of the integrated bar in California has recently been confirmed by an overwhelming majority of the voters of the state. In the November 8, 1960, general election the people approved a constitutional amendment (identified on the ballot as "Proposition 10") which, among other things, added the following to the California Constitution as Section 1c of Article VI:

"Sec. 1c. The State Bar of California is a public corporation with perpetual existence and succession. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a justice or judge of a court of record."

The popular vote on Proposition 10 was: *Yes*, 3,421,376; *No*, 1,191,946 votes—a majority of nearly three to one (*State Bar Reports*, Dec. 1960, p. 1).

The statutory powers and functions of the State Bar of California divide themselves broadly into several categories: (1) Assisting the Supreme Court of California in the matter of admissions to practice law by investigating and examining applicants and certifying those found to be qualified (Bus. and Prof. Code, Secs. 6060-6068); (2) Assisting the Supreme Court in the matter of enforcement of proper conduct on the part of members of the bar by investigating and hearing complaints and administering reprimands or making recommendations to the Supreme Court for suspension or disbarment when cause for such action is found (*id.*, Secs. 6075-6087); (3) Aiding in "such matters as concern the relations of the bar with the public" (*id.*, Sec. 6031); (4) Aiding in "the advancement of the science of jurisprudence" and in "the improvement of the administration of justice" (*id.*, Sec. 6031); and (5) Policing the unauthorized practice of law. A descriptive outline of these activities of the State Bar of California is attached as an appendix. It will be seen that in many respects the activities and functions of the State Bar of California are similar to those of the State Bar of Wisconsin as described by the Supreme Court of that state in the appendix to its opinion herein (Transcript of Record, cited herein as "R.", 77-81).

Since Appellant seeks to strike down integrated bars as *per se* unconstitutional invasions of the freedom of lawyers, a decision such as he asks here might destroy The State Bar of California. As *amicus curiae*, therefore, The State Bar of California supports the position of Appellee.

QUESTION PRESENTED

Do the facts disclosed by this record demonstrate that, in requiring Appellant to be a member of and pay dues to the State Bar as a condition to practicing law in Wisconsin, the Supreme Court of that state has deprived Appellant of "life, liberty, or property, without due process of law" in violation of the Fourteenth Amendment of the United States Constitution?

SUMMARY OF ARGUMENT

This case comes up only on the record made by the allegations of Appellant's complaint. From the facts alleged, no broad questions of freedom of speech are raised. On the record, Appellant has merely been required to enroll with and pay dues to a self-governing organization which is part of the government of the State of Wisconsin. Constitutional questions are limited to consideration of the lawfulness of requiring enrollment and payment of dues.

Reasonable regulation of admission to practice and of the practice of law itself is a permissible object of state action. Moreover, a state has a clear interest in taking affirmative action to improve the administration of justice in its courts.

A state could legitimately regulate the lawyers practicing in its courts through any appropriate public body. Regulation requires enrollment. This public body could constitutionally require all lawyers practicing in the state to enroll with it, and it could spend state funds reasonably to regulate them. Since the enrolled lawyers themselves are uniquely

qualified to administer the required professional standards, and since their interest in maintaining those standards is great, the state may organize its lawyers in a public body and delegate to it the regulation of the practice of law, and require the lawyers themselves to bear the reasonable expense involved.

Methods of improving the administration of justice are best studied before reform is undertaken. States have traditionally called upon readily available legal talent to study possible law reform and to recommend the best course of action. Thus, the State Bar of Wisconsin, which is beneficially interested in improvements in the administration of justice, may legitimately be called upon to study and to support such improvements.

This Court's decision in *Railway Employes' Dep't v. Hanson*, 1956, 351 U.S. 225, forecloses decision for Appellant on the record in this proceeding.

ARGUMENT

I. The Question Is a Very Narrow One.

Much as Appellant would like this Court to examine the entire scope of the potential activities of the State Bar of Wisconsin and then hold it invalid because its activities might some day interfere with his freedom as a lawyer, and much as Appellee and this *amicus curiae* and other integrated bars might like this Court to issue a broad and sweeping opinion upholding integrated bars and everything they do or may do, it is clear that these wishes of the parties and *amici curiae* cannot be fulfilled under the rules which this Court has wisely established and followed in dealing with questions of constitutionality of legislation and other governmental acts. Those rules, as outlined by Mr. Justice Brandeis in his dissenting opinion in *Ashwander v. Tennes-*

see Valley Authority, 1936, 297 U.S. 288, 346-348, and frequently cited (*e.g., Rescue Army v. Municipal Court*, 1947, 331 U.S. 549, 568-569), declare that "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N.Y. & P.S.S.Co. v. Emigration Commissioners*" 1885, 113 U.S. 33. Thus, the question here is the very narrow one: does the record here show any actual or threatened unconstitutional invasion of Appellant's freedoms?

Since this case was decided below upon a general demurrer to the complaint (R., 49, 64), the record upon which the question must be decided here consists of the factual allegations of the complaint, assuming them to be true. These allegations show that Appellant was admitted to practice law in Wisconsin in 1948, was a member of a state-wide bar association from then until 1957, became a member in 1957 of the newly-created State Bar of Wisconsin "in order to be able to continue to practice law", paid his dues to the latter organization in 1957 and 1958 without protest and in 1959 with protest, and seeks to recover his 1959 dues as having been collected from him by coercion "in violation of the Fourteenth Amendment" (R., 2-7). The complaint also alleges (R., 5) "That except for the coercion upon attorneys to become members thereof and to financially support it, the State Bar of Wisconsin functions in substantially the same manner and carries on substantially the same work" as did the pre-existing voluntary bar association of which Appellant had been a member.

The complaint does not allege that the State Bar of Wisconsin has interfered with Appellant's freedom of speech, his freedom of assembly, or his freedom of petition, or that it threatens to do so. It does not even allege that the State Bar advocates or does anything to which he has

any personal objection, except that in one single instance (R., 6) the State Bar opposed the adoption of legislation (not identified or even described) which Appellant favored. Even in respect to that one instance, Appellant does not allege that the State Bar interfered in any way with his right or opportunity to express his own views on the proposed legislation nor does he allege that the State Bar purported to speak for him or represented that it had authority to speak for him.

Appellant in his brief contends at some length (pp. 28-30, 65-77) that the State Bar of Wisconsin interferes with a member's freedom of speech in the curious sense that if a member should happen not to agree with some view expressed by the State Bar then the member *might* be forced to speak for himself to avoid being regarded as supporting the expressed view of the State Bar. This, says Appellant, would be an interference with a lawyer's freedom *not* to speak—his freedom to remain silent. Intermingled with this contention in Appellant's brief is the argument that the State Bar's amplified voice might interfere with a dissenter's freedom of speech by drowning out his individual voice.

But Appellant's complaint, like his hypothetical dissenter, is silent upon this subject. He does not allege either in specific terms or in generalities, that the State Bar of Wisconsin has in fact forced him to speak for himself or that it threatens to do so. He does not allege that it has drowned out his individual voice. He does not even allege that he ever raised his voice, or sought to do so.

These contentions of Appellant are based upon hypotheses only, without any factual support in the record. We disagree, of course, with Appellant's contentions, but we do not propose to debate them here because there is no basis

on this record for any ruling upon them. As this Court has said in refusing to review the constitutionality of a statute in absence of evidence that an actual interference was threatened, "A hypothetical threat is not enough" (*United Public Workers v. Mitchell*, 1947, 330 U.S. 75, 90).

Accordingly, we confine ourselves to the only real issue presented by this record, namely, does the record show that Appellant has been deprived of his rights under the Fourteenth Amendment by being required to enroll with and pay dues to the State Bar of Wisconsin as a condition to practicing law in that state?

II. It Is a Permissible Objective of Government for a State to Interest Itself in the Lawyers Who Practice Before Its Courts and in Improvement of the Administration of Justice.

There cannot be any legitimate doubt that a state may interest itself in imposing and maintaining reasonable standards of proficiency and qualification for the practice of law. Lawyers acting "in defense of right and to ward off wrong", occupy such an important position in the organization of our society that the highest moral character is required of them (*Schware v. Board of Bar Examiners*, 1957, 353 U.S. 232, 247-48) (Mr. Justice Frankfurter, concurring). That right triumph over wrong in the courts of a state is necessary to good government and material to the general welfare. The state, then, has a legitimate interest in ensuring that its lawyers meet the requisite standards. "Admission to practice in a State and before its courts necessarily belongs to that State" (*id.*, 248).

The courts of a state are part of the government of the state. Government has a clear interest in ensuring its efficient operation. The efficient operation of the courts is influenced by the organization of the judicial system, the

methods of practice and procedure employed, and the clarity of the laws applied. The validity of reasonable state action to effect improvements in these areas is beyond question.

III. The Valid State Interests in the Lawyers Who Practice Before Its Courts and in Improvement of the Administration of Justice Are Reasonably Exercised by Requiring Registration With and Payment of Dues to an Integrated Bar Which Actively Supports Law Reform.

A state can act only through agents. Therefore, some instrumentality is required to effect the state's legitimate interest in regulating admission to practice and in ensuring that attorneys continue to meet the high standards required. This Court has on occasion upheld the action of public agencies organized to effect analogous state interests in regulating other learned professions (*Douglas v. Noble*, 1923, 261 U.S. 165 (Dentists); *Dent v. West Virginia*, 1889, 129 U.S. 114 (Physicians); *cf., Goldsmith v. United States Board of Tax Appeals*, 1925, 270 U.S. 117) (Practitioners). Thus, both reason and closely analogous precedent sustain the conclusion that a state can regulate the practice of law through a public agency.

Supervision of admission to practice and regulation of the practice itself cost money. Examinations must be prepared, administered, graded. Unauthorized practice of law must be enjoined and violators prosecuted. Unethical conduct must be investigated, and hearings must be held. These activities represent the minimum which a state agency should do to effect the unquestionably legitimate state interest in protecting the public "against the consequences of ignorance and incapacity as well as of deception and fraud" (*Dent v. West Virginia*, 1889, 129 U.S. 114, 122). Even the minimum requires office space, staff, and other facilities incident to running any businesslike operation,

and funds for these purposes must be provided. Since the state interest is valid, the state may properly spend money to effect it.

Supervision of admission to practice and regulation of the practice itself depend upon records of who is entitled to practice within the state. An attorney can be admitted to a roll of practicing attorneys only if there is a roll, and an attorney can be disciplined by removing him from the roll of those entitled to practice only if there is a roll. A reasonable way to compile a roll and to keep it current is to require those eligible to be enrolled to enroll. Thus, a state agency could legitimately require all practicing attorneys to enroll with it.

A state may legitimately call upon all enrolled lawyers as the group uniquely qualified to aid the state in maintaining the standards of the legal profession (*State Bar v. Superior Court*, 1929, 207 Cal. 323, 278 Pac. 432). The state interests involved are matched by those of the members of the profession in maintaining their own standards. To require the group which benefits from legitimate government action to bear the reasonable expense incurred cannot be arbitrary and a denial of due process (*Railway Employes' Dep't v. Hanson*, 1956, 351 U.S. 225, 236-38; *Herron v. State Bar*, 1944, 24 Cal. 2d 53, 64; 147 P.2d 543, 549, *cert. denied*, 323 U.S. 753).

Certainly a state may create a public agency or bureau to assist in regulating the practice of law. Clearly, also, a state may spend its general tax revenues to pay the cost of such an agency. The distribution of a state's powers among its agencies or officers is solely a matter of state concern (*Sweezy v. New Hampshire*, 1957, 354 U.S. 234, 256) (Mr. Justice Frankfurter, concurring). Therefore, a state surely may delegate the regulation of law practice to a state

agency composed of the lawyers themselves, and it may also give them reasonable powers of self-government. It is none the less a state agency because some of the state's authority is delegated to public officers elected by those who are governed. And there can be no legitimate objection to the state's financing the agency by a special license fee upon those who are subject to the agency's jurisdiction rather than by a general tax upon all taxpayers (*Herron v. State Bar*, 1944, 24 Cal. 2d 53, 64, 147 P.2d 543, 549, *cert. denied*, 323 U.S. 753).

Appellant objects, however, that by this process he is coerced into "membership" in the State Bar. Every lawyer who is admitted to practice before any court is *ipso facto* a "member of the bar" of that court. When he applies for admission to practice, he asks to be made a "member of the bar". He continues to be a member of the bar of the court as long as he retains the right to practice before the court, and he ceases to be a member only when he dies, retires from practice, or is disbarred.

The rules of this Court—the Supreme Court of the United States—establish a procedure for admission to practice before the Court, and they speak of one who is admitted as a "member of the bar" of the Court (Rules 5, 6 and 8). One of the several conditions for admission to practice is the filing of a personal statement, another is the taking of an oath or affirmation, and another is the payment of a fee (Rule 5). No better precedent than this could be cited for the proposition that the practice of law in any court may be limited to those who enroll and pay a reasonable fee.

It cannot, therefore, be the mere requirement of "membership" in the bar to which Appellant objects, though some of his argumentation might lead one to think so (*e.g.*, pp. 24-28 of Appellant's Brief). What he really complains about is the fact that the bar of Wisconsin—different from the

bar of this Court—is a self-governing group with definite powers and responsibilities as an agency of the state government, including certain functions in respect to the improvement of the administration of justice in the state.

The legitimate state interest in the organization of its judicial system, the procedures practiced in its courts and the administration of justice requires the state to attempt affirmatively to improve the organization, the procedures and the laws. Improvement often means change. In an area so important as this to the general public welfare, change is best preceded by study, with an ultimate recommendation by the experts best qualified concerning the desirability of alternative courses of action. In the area of judicial organization, practice and procedure, those obviously qualified by education and experience to study and recommend possible improvements, and those whose professional livelihood depends upon proper functioning of this machinery, are the lawyers.

States can use legal experts to study and to recommend. California has done so. In 1926, the California Constitution was amended to create a Judicial Council. The Council's members have traditionally been state judges, and recently the addition of four lawyers was authorized (Calif. Const., Article VI, Sec. 1(a), as amended November 8, 1960). The Council surveys "the condition of business in the several courts with a view to simplifying and improving the administration of justice" and reports "to the Governor and Legislature at the commencement of each regular session with such recommendations as it may deem proper". Also among its duties is the task of submitting "to the Legislature, at each general session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure" *(ibid.)*.

Moreover, California has established a Law Revision Commission (Gov't Code, Secs. 10300-10351) and a Commission on Uniform State Laws (Gov't Code, Secs. 10400-10433). Lawyers and members of the State Legislature are appointed to these government agencies. Government funds are spent by each agency (Gov't Code, Secs. 10302, 10407). These state governmental units, created to improve the administration of justice, serve as examples of reasonable state use of legal talent as expert advisers in law reform. An integrated bar is another example of a similar use of legal talent to improve the administration of justice while at the same time exercising the state's power to regulate and improve the practice of law. Such reasonable means to achieve a legitimate end must be constitutionally irreproachable. The federal constitution does not compel the states to legislate or to determine matters of public policy in a context in which only the knowledge possessed by those having the power to decide is brought to bear.

We submit that an integrated bar may properly compel the payment of reasonable dues by members to support these legitimate state objects in which by necessity all lawyers are beneficially interested. States may properly use legal talent assembled for a legitimate purpose to improve the administration of justice. An integrated bar whose members are required to contribute to maintain professional standards represents a collection of legal talent legitimately part of the state government. All lawyers are interested in bona fide attempts to improve the administration of justice, and they benefit from them. Therefore, the state can call upon its integrated bar to contribute to attempts to improve the administration of justice, including support for legislation directed toward that end.

IV. On This Record, Requiring Enrollment With and Payment of Dues to the State Bar of Wisconsin Does Not Deprive Appellant of Due Process.

In *Railway Employes' Dep't v. Hanson* 1956, 351 U.S. 225, 236-38, this Court held that compulsory membership in an association and payment to it of periodic dues were constitutional conditions to the retaining of employment in interstate commerce, so long as the funds collected were used for purposes germane to the valid objectives of the association and for the benefit of its members. Regulation of interstate commerce is a valid function of the federal government, just as regulation of the practice of law is a valid function of state government. Regulation of admission, regulation of practice, and study of and support for apparently desirable legislation to improve the administration of justice are all germane to the practice of law and of benefit to all lawyers.

On the record Appellant has made here, this case is the *Hanson* case. None of the "other conditions" against which this Court warned in *Hanson* are present on this record.

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief for Appellee, the decision of the Supreme Court of Wisconsin should be affirmed.

We have been requested by Owen B. Marron, Esq., of Albuquerque, New Mexico to state that the State Bar of New Mexico, an integrated bar established by statute (1953 New Mexico Statutes Sec. 18-1-2), has appointed a Special Committee on the Integrated Bar Case, of which Mr. Marron is Chairman, and that, pursuant to order of the Supreme Court of New Mexico made and filed December 20, 1960, the Committee approves and endorses the foregoing brief on behalf of the State Bar of New Mexico.

Respectfully submitted,

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(Appendix Follows)

Appendix

BRIEF OUTLINE OF THE PRINCIPAL FUNCTIONS AND ACTIVITIES OF THE STATE BAR OF CALIFORNIA

Organization

The State Bar of California is governed by a board consisting of fifteen lawyers who are nominated and elected by the members of the bar by secret ballot (Calif. Bus. and Prof. Code, Secs. 6010, 6011, 6015, 6019; State Bar Rules and Regulations, Article II). The members of the board are elected from nine geographical districts established by the State Legislature (*id.*, Sec. 6012). They serve for three years (*id.*, Sec. 6014), are not re-electable (*id.*, Sec. 6014), and receive no compensation except their expenses (*id.*, Sec. 6028). The board annually elects the officers of the State Bar (*id.*, Secs. 6021-6024).

Admission to Practice

As authorized by statute, the board of governors of the State Bar has established "an examining committee having the power: (a) To examine all applicants for admission to practice law. (b) To administer the requirements for admission to practice. (c) To certify to the Supreme Court for admission those applicants who fulfill the requirements provided in this chapter." (Bus. and Prof. Code, Secs. 6046, 6060-6068).

Pursuant to statutory authority (Bus. and Prof. Code, Sec. 6047), this Committee of Bar Examiners has issued comprehensive rules which incorporate the statutory standards for admission and establish a registration, examination, investigation, and certification procedure for all processing of applicants preliminary to formal admission to practice (West's Annot. Calif. Codes, 1 Bus. and Prof. Code, pp. 624-640). The final decision upon the admission of applicants to the practice of law and the formal "swear-

ing in" of the admittees are Supreme Court prerogatives (Bus. and Prof. Code, Sec. 6064).

Discipline

The review of disciplinary matters forms a very large part of the work of the board of governors and the committees of the State Bar (35 *Journal of The State Bar of California*, hereinafter "*Journal*", 113). Under its governing statute the State Bar has established "a complete . . . method of hearing and determining accusations against members of the State Bar" (Bus. and Prof. Code, Sec. 6075), and with the approval of the Supreme Court the board of governors has formulated and enforces rules of professional conduct for all members of the bar in California (*id.*, Sec. 6076; West's Annot. Calif. Codes, 1 Bus. and Prof. Code, pp. 643-658).

For the receiving, processing, investigating and hearing of complaints against members of the bar some 300 lawyers are appointed and act as preliminary screening committees, assistant secretaries, examiners and hearing committees. All of them serve voluntarily and without compensation. In addition, the disciplinary procedures require the services of investigators, administrative assistants and clerks who are salaried members of the staff of the State Bar. After completion of all preliminary procedures and formal hearings, all questions as to the imposition of discipline come before the board of governors for review. The board may impose a reprimand, either public or private, by its own order, subject to court review (Bus. and Prof. Code, Sec. 6078). As to more severe discipline in the form of suspension or disbarment, the authority of the board is limited to making a recommendation to the Supreme Court for final action by it (*ibid.*). (For a more comprehensive description of the disciplinary procedure see 35 *Journal* 109-115).

Similar procedures are involved in passing upon applications for reinstatement (Rules of Procedure, Rules 43-55, West's Annot. Calif. Codes, 1 Bus. and Prof. Code, pp. 711-717), and in handling references from the Supreme Court with respect to the degree of discipline to be imposed upon lawyers who are convicted of certain crimes (Bus. and Prof. Code, Secs. 6101-6116).

It was with particular reference to the State Bar's responsibilities and functions in disciplinary proceedings that the Supreme Court of California observed some thirty years ago that the officers of the State Bar of California function as "an arm or branch of this court" (*Herron v. State Bar*, 1931, 212 Cal. 196, 199, 298 Pac. 474, 475).

Public Relations

The board of governors of the State Bar, as part of its statutory power to aid in the administration of justice, is authorized to aid in advancing "the professional interests of the members of the State Bar" and to aid in "such matters as concern the relations of the bar with the public". (Bus. and Prof. Code, Sec. 6031) The State Bar engages in an active public information program (28 *Journal* 321). The bar publishes a speaker's manual. It also has prepared a series of newspaper columns, "Law in Action" and "Law in the News", to aid in informing the members of the public of their legal rights. Occasionally pamphlets are issued outlining court procedure.

One of the most important of the activities authorized by these provisions is publication of the bi-monthly *Journal of The State Bar of California* and of the monthly *State Bar Reports*. These publications are mailed to all enrolled members and to some extent to the general public as well.

The *Journal* acquaints the bench and bar with recent or proposed statutory changes and, in some cases, affords a valuable source of the legislative history of measures sponsored by the State Bar. The *Reports* inform the members of current and contemplated activities of the State Bar and its numerous committees.

In addition, to serve the public, the State Bar sponsors the establishment of legal aid services, of which there are at present about thirty in the state (35 *Journal* 436-441, 574). The bar also participates in encouraging development of lawyer reference services (*id.*, 574-5).

Advancement of Jurisprudence and Improvement of the Administration of Justice

The board of governors of the State Bar is, by statute authorized to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice" (Bus. and Prof. Code Sec. 6031).

For this purpose, the State Bar engages in an active program to improve the administration of justice through legislation (See, *e.g.*, 34 *Journal* 511-524). Under its leadership the general corporation law of California was completely revised (8 *Journal* 136). Trial court civil and criminal procedures were also modernized with assistance from the State Bar (8 *Journal* 209; 9 *id.* 307-308). Selection of judges has been an object of state bar legislative activity (8 *Journal* 53-56; 9 *id.*, Part II, 42, 45, 55). The State Bar has studied appellate review and acted to eliminate congestion of appellate calendars (12 *Journal* 249, 16 *id.*, Part II, 3, 26). In addition legislative reform of administrative procedure has been undertaken by the State Bar (14 *Journal*, Part II, 46-55; 16 *id.*, Part II, 32-85; 20 *id.*, 198-202; 22 *id.*, 391-96). Rules on appeal (18 *Journal* 129, 132,

135-48), inferior court organization (20 *Journal* 293-345; 24 *id.*, 235; 25 *id.*, 258-78), and discovery procedures (31 *Journal* 204-231), have been improved with assistance from the State Bar. Recent bar efforts have been concentrated on proposals for constitutional amendments to provide a procedure for removal of judges for cause, to strengthen and enlarge the Judicial Council, to establish a state-wide court administrator, and to authorize the legislature to provide for appellate review of certain inferior court decisions. All of these constitutional amendments were approved by the electorate on November 8, 1960 (*State Bar Reports*, Dec. 1960, page 1).

Presently the State Bar is engaged in studying the proposed Uniform Code of Evidence, the Uniform Commercial Code, the Uniform Arbitration Act, and possible revision of California's eminent domain laws.

Many proposals for state bar study and recommendation originate in its democratically selected Conference of State Bar Delegates. Others come from the numerous committees of the State Bar and from other sources. Most committee reports receive publicity in the *Journal* (34 *Journal* 461-83; 35 *id.* 366-95). The board of governors eventually decides what the formal position of the State Bar will be (34 *Journal* 511-512), and this is widely publicized during the legislative sessions (See, *e.g.*, 32 *Journal* 13-25; 34 *id.* 151-164). In addition to sponsoring its affirmative program, the bar stands ready to aid the Legislature by answering questions about procedural and other matters concerning the administration of justice when bills affecting these areas are considered (35 *Journal* 558, 571-72). Individual bar members are free to challenge the formal program or position of the State Bar (34 *Journal* 461, 476; 35 *id.* 366, 370). Furthermore, it is clear that the bar representatives

are not authorized and do not purport to speak for every member of the bar.

For this purpose of improving the administration of justice, the State Bar, assisted by the University of California, administers a program of continuing education of the bar. In 1960 a total of 16,300 lawyers registered and paid fees for separate courses offered during the year (35 *Journal* 422).

Unauthorized Practice of Law

The State Bar of California maintains a Committee on Unauthorized Practice of Law, established by the board of governors pursuant to its responsibility (Bus. and Prof. Code, Sec. 6030) to enforce the provisions of the code prohibiting the practice of law by persons who are not members of the State Bar (*id.*, Sec. 6125). This committee investigates complaints and issues warnings. Through the activities and negotiations of this committee the limits of permissible activity of banks, title companies, licensed collection agents, insurance company adjusters, and certain motor clubs have been defined (See the current report of the committee, 35 *Journal* 455-458).

Finances

The activities of the State Bar are financed with funds derived from dues paid by the members and examination fees paid by applicants for admission to practice (34 *Journal* 898). The operations of the State Bar therefore represent no burden upon the taxpayers of the State. (*ibid.*) All of the State Bar funds are devoted to carrying out the objectives and responsibilities of the State Bar, and none is used for social purposes, entertainment or other extracurricular activities. (For analyses of State Bar expenditures and budgets see 28 *Journal* 425, 29 *id.* 338, 33 *id.* 486).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 200.

TRAYTON L. LATHROP,
Appellant,

vs.

JOSEPH D. DONOHUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF THE STATE OF MISSOURI, AMICUS CURIAE,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF THE STATE OF MISSOURI, AMICUS CURIAE,

By Its Attorney General.

INTEREST OF THE STATE OF MISSOURI.

The appellant in this case attacks the validity, under the Fourteenth Amendment to the Constitution of the United States, of the order of the Supreme Court of Wisconsin integrating the bar of that state.

The bar of the State of Missouri has been integrated pursuant to the Rules of the Supreme Court of Missouri. The first step towards integration of the Missouri bar was undertaken by the Supreme Court of Missouri in 1934 by the adoption of rules covering admissions to the bar, prescribing a code of ethics for Missouri lawyers, establishing machinery for the handling of complaints and disciplinary actions against Missouri lawyers, and establishing a judicial council. These rules further provided for the enrollment of all the attorneys in the state and the payment of an annual enrollment fee by each attorney in order to provide funds for carrying out the rules.[1]

On June 16, 1944, the Missouri Supreme Court promulgated Rule 40, for the organization of the Missouri Bar, whereby an wholly integrated bar was established.[2]

The integration of the Missouri Bar preceded by a short time the adoption, on February 27, 1945, by the people of the State of Missouri, of a new Constitution for the government of the state. That instrument recognized the authority of the Supreme Court of Missouri to establish rules of procedure for the courts of the state.[3] Pursuant to such authority, the Supreme Court of Missouri has promulgated rules of criminal procedure,[4] rules of civil procedure[5] and rules of procedure for traffic courts[6] of the state. All of such rules are designed to promote the administration of justice in Missouri.

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1. Rules 35 to 39, 335 Mo. vii-xx

2. 352 Mo. xxxi-xxxvi.

3. §5, Art. V, Const. of Mo. 1945.

4. Rules 21 to 36, 1 Vernon's Annotated Mo. Rules, pp. 115-294.

5. Rules 41 to 102, Vols. 2 and 3, Vernon's Annotated Mo. Rules.

6. Rule 37, 1 Vernon's Annotated Mo. Rules, pp. 305-381.

Although such rules have been prepared by the Supreme Court and by committees appointed by that body, the integrated Missouri Bar has contributed greatly to the advances which such rules represent. Prior to the adoption of the rules, the proposed rules were subjects of state-wide discussion meetings held under the auspices of the Missouri Bar. The publication of the Missouri Bar served as a forum for the presentation of different views on various matters covered by the rules.[7] Upon the adoption of the rules by the Supreme Court, the Missouri Bar sponsored a number of institutes throughout the state in order to familiarize the bar with such new rules.

The fact that Missouri had an integrated bar with adequate financial resources derived from the entire bar of the state placed the bar in a position to assist and contribute in large measure to the objective of improving the administration of justice through modern methods of practice and procedure.

The activity of the Missouri Bar in this area is an example of the body's efforts to further the interests, not of the bar alone, but of the entire State of Missouri. Because of the contributions which the Missouri Bar has made and will continue to make to the general welfare of the state, the State of Missouri is directly interested in sustaining the validity of the present organization of the Missouri Bar. Should this Court sustain the contentions of the appellant in this case, the present organization of the Missouri Bar would be seriously threatened. The State of Missouri believes that the judgment of the Su-

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7. Richardson, Should the Scope of Pre-Trial Discovery be Expanded? 14 Jour. Mo. Bar 8 (Jan 1958); 14 Jour. Mo. Bar 118 (April, 1958).

Hocker, Should the Scope of Pre-Trial Discovery be Expanded? 14 Jour. Mo. Bar 44 (Feb., 1958).

preme Court of the State of Wisconsin in this cause is correct and should be affirmed. To that end, this brief, *amicus curiae*, is submitted by the State of Missouri in support of the position of the appellee in this cause.

ARGUMENT.

On behalf of *amicus curiae*, it is respectfully submitted to the Court that the brief for the appellee in this cause completely and fully supports the decision of the Supreme Court of Wisconsin and fully answers all attacks by the appellant herein on such decision. *Amicus curiae* respectfully joins in and supports the brief and argument of the appellee in this cause and respectfully submits that if this Court accepts jurisdiction of this cause, the decision of the Supreme Court of Wisconsin should, for the reasons set out in the brief of appellee herein, be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1960
NO. 200

TRAYTON L. LATHROP,
Appellant,

-vs-

JOSEPH D. DONOHUE,
Appellee.

On Appeal from the Supreme Court of Wisconsin

BRIEF OF AMICUS CURIAE THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar was created by rule of the Supreme Court of Florida in the exercise of its inherent powers on June 7, 1949. Petition of Florida Bar Association, 40 So. 2d 802 (Fla. 1949).

Subsequent to that time Article V of the Constitution of Florida relating to the judicial department has been revised and in the revision the exclusive jurisdiction of the Supreme Court of Florida over admission to the practice of law and the discipline of persons admitted has been expressly recognized.

The Florida Bar operates under the Integration Rule of the Supreme Court of Florida, carries on extensive programs of service to the public and the profession, and has made outstanding contributions to the improvement of the administration of justice and has great interest in the question of the validity of rules of courts creating an integrated bar.

STATEMENT OF THE CASE

We adopt as part of this brief the Statement of the Case set forth at pages 3-5 in the Brief of Appellee in support of his Motion to Dismiss.

QUESTION PRESENTED

Do the orders and rules of the Supreme Court of Wisconsin integrating the bar of that state violate any of appellant's rights under the Constitution of the United States.

SUMMARY OF ARGUMENT AND PRINCIPLES OF LAW RELIED UPON

(1) The rights of freedom of association, freedom of speech and publication, and protection of property are not absolute, but are relative and may be reasonably limited, restricted or restrained by appropriate authority in the public interest.

(2) The practice of law is affected with public interest and the state acting through its courts or legislature, or both, may impose such reasonable limitations, restrictions or restraints, or may impose such requirements upon those admitted to the practice of law as are reasonably designed to serve the public interest, safeguard the administration of justice, enhance the prestige of the profession, maintain high standards of ethical conduct, advance the science of jurisprudence and achieve those purposes and objectives essential to the people's welfare.

(3) The requirement that persons admitted to practice law in a state shall be members of the integrated bar of that state and pay reasonable dues thereto, is a reasonable requirement and not violative of any of such persons' rights under the Constitution of the United States.

ARGUMENT

I. THE RIGHTS OF FREEDOM OF ASSOCIATION, FREEDOM OF SPEECH AND PUBLICATION, AND PROTECTION OF PROPERTY ARE NOT ABSOLUTE, BUT ARE RELATIVE AND MAY BE REASONABLY LIMITED, RESTRICTED OR RESTRAINED BY APPROPRIATE AUTHORITY IN THE PUBLIC INTEREST.

This principle of law is so fundamental and well-established that it requires neither extensive restatement nor citation of numerous authorities for its support.

This Court and other authorities have recognized and established this principle as an integral part of the law of the land.

Right of Free Association

In *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 391, 392 (1936) this Court said:

"The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is

reasonable in relation to its subject and is adopted in the interests of the community is due process.

* * * * * *

"'But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. *Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.*' Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 565." (Emphasis ours)

Protection of Property

In *Interstate Consolidated Street Railway Company v. Massachusetts,* 207 U. S. 79, 87 (1907) this Court said:

"The obverse way of stating this power in the sense in which I am using the phrase would be that *constitutional rights, like others, are matters of degree,* and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation." (Emphasis ours)

Freedom of Speech and Publication

In *Near v. Minnesota,* 283 U. S. 697, 708 (1930) this Court said:

"*Liberty of speech* and of the press *is* also *not an absolute right*, and the state may punish its abuse. Whitney v. California, 274 U. S. 357, 362, 373, supra; Stromberg v. California, (283 U. S. 359)." (Emphasis ours)

The argument of appellant seems to be that he has two absolute rights involved in this case, one to practice law before the courts of the state, and the other to be free from requirements and restraints by the Supreme Court of the state. It seems to us that appellant has overlooked an applicable fundamental principle which was graphically enunciated by Mr. Justice Holmes, for the Supreme Court of Massachusetts, in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 NE 517 (1892).

In that case a policeman in New Bedford accepted employment as such under civil service rules that prohibited city employees engaging in political activities. Upon being discharged for violating the prohibition, the policeman in question sued for reinstatement on the theory that the rule was invalid because it infringed upon his constitutional right of freedom of speech. The fallacy of this reasoning was exposed and the theory disposed of by Mr. Justice Holmes in the famous epigram:

"The Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

II. THE PRACTICE OF LAW IS AFFECTED WITH PUBLIC INTEREST AND THE STATE, ACTING THROUGH ITS COURTS OR LEGISLATURE, OR BOTH, MAY IMPOSE SUCH REASONABLE LIMITATIONS, RESTRICTIONS OR RESTRAINTS OR MAY IMPOSE SUCH REQUIREMENTS UPON THOSE ADMITTED TO THE PRACTICE THEREOF AS ARE REASONABLY DESIGNED TO SERVE THE PUBLIC INTEREST, SAFEGUARD THE ADMINISTRATION OF JUSTICE, ENHANCE THE PRESTIGE OF THE PROFESSION, MAINTAIN HIGH STANDARDS OF ETHICAL CONDUCT, ADVANCE THE SCIENCE OF JURISPRUDENCE AND ACHIEVE THE PURPOSES AND OBJECTIVES ESSENTIAL TO THE PEOPLE'S WELFARE.

The stated purposes of the Supreme Court of Wisconsin in its orders integrating the bar of that state are:

"Section 2. Purposes. The purposes of the association shall be to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities

of the legal profession may be more effectively discharged." (Tr. p. 8)

These purposes and objectives are the historic and traditional purposes and objectives of the profession of the law and from the foundation of the Republic have received the sanction of the courts, the approval of our legislative bodies and the approbation of the public.

Members of the bar are officers of the courts, indispensable agents in the administration of justice, an integral part of the judicial department of government and every function they perform, every responsibility they assume and every duty they discharge is affected with public interest.

The confidence of the public in the courts is an essential ingredient in our system of administration of justice and the confidence of the public in the integrity of the bar and its membership is an integral part of that ingredient.

This confidence of the public in the bar and its membership, being essential to the confidence of the public in the courts, must be established and maintained if our system of administration of justice is to endure.

The court's control of the professional life of an attorney arises from the relation of the the attorney to the courts, his responsibilities to the litigants before the courts and the indispensable part the attorney has in the functions of the courts.

The power, duty and responsibility of the courts to limit those who appear before it as attorneys to those who have attained to a required degree of learning and proficiency in the law and have established their character and integrity to the satisfaction of the court has been recognized from time immemorial.

The power of the courts to prescribe rules of conduct for attorneys, to promulgate standards of ethical behavior and to enforce those rules and regulations necessary for the preservation of the integrity of the bar is a power beyond question.

It has been well said that "membership in the bar is a privilege burdened with conditions." A universally recognized condition is that an attorney shall abide by the canons of ethics of the profession and conduct his professional life in accordance therewith.

Even the most casual study of the canons universally imposed and accepted for conduct of attorneys demonstrates that they limit and restrict freedom of action, speech, and contract. An attorney cannot contract to represent conflicting interests; he cannot solicit clients; he cannot advertise his qualifications or achievements and even his comments on matters of public interest in which he is professionally engaged must be limited to a simple recitation of facts as they appear in the records and papers on file in the court.

No one could successfully gainsay the wisdom of these restrictions. They have been universally enforced by the courts for centuries without dissent because they

are essential to the prestige of the courts, the dignity and integrity of the bar and the proper functioning of the lawyers in the administration of justice.

This Court has said in *Randall v. Brigham*, 74 U. S. (7 Wall) 523, 540 (1868);

> "The authority of the court over its attorneys and counselors is of the highest importance. They constitute a profession essential to society. Their aid is required, not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided to their management. The confidence which they receive and the responsibilities which they are obliged to assume, demand not only ability of a higher order, but the strictest integrity. The authority which the courts hold over them, and the qualifications required for their admission, are intended to secure these qualities."

In *Ex Parte A. H. Garland*, 71 U. S. (4 Wall) 333, 378 (1866) the Court said:

> "The profession of an attorney and counselor is not like an office created by an act of congress, which depends for its continuance, its powers and emoluments, upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. *** They are officers of the court; admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. *** The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry *the parties*

become officers of the court and are responsible to it for professional misconduct. (Emphasis ours)

In the case of *Theard v. U. S.*, 354 U. S. 278, 281 (1957), the Court said:

> "The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. " 'Membership in the bar is a privilege burdoned with conditions' (*Matter of Rouss*, [221 NY 81, 84, 116 NE 732]) The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." People ex rel. Karlin v. Culkin, 248 NY 465, 470, 471, 162 NE 487, 489."

It therefore appears conclusively that the rights of freedom of association, freedom of speech and property rights are not absolute but relative rights and that courts have the power, duty and responsibility to regulate the conduct of attorneys, to impose and enforce such restraints, restrictions and limitations or to make and enforce such requirements relative thereto as shall be reasonably necessary or expedient to achieve those objectives which are universally recognized as essential to proper functioning of the bar and the members thereof as an indispensable part of our system of administration of justice.

These two propositions bring us to the crux of this case. Is the requirement that an attorney be a member

of an integrated bar and that he pay dues in support thereof such an arbitrary requirement as to justify this court in declaring such requirement violative of rights guaranteed by the Constitution of the United States? As set forth under Point III hereafter, we submit that such requirement is reasonably necessary and appropriate for the accomplishment of a legitimate object within the power, duty and responsibility of the court having jurisdiction.

III. THE REQUIREMENT THAT PERSONS ADMITTED TO PRACTICE LAW IN A STATE SHALL BE MEMBERS OF THE INTEGRATED BAR AND THAT THEY SHALL PAY REASONABLE DUES THERETO IS A REASONABLE REQUIREMENT AND NOT VIOLATIVE OF ANY OF SUCH PERSONS' RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

This Court has within the last few years had before it three cases of significance in the matter of state action in relation to attorneys. It is evident that this Court has given careful study to the relation of attorneys to the courts, the reasonableness of state action, and particularly the matter of limits of review by this Court of such matters.

In *Schware v. Board of Bar Examiners*, 353 U. S. 323 (1957), this Court held that it had jurisdiction to review the action of the Supreme Court of New Mexico in refusing to admit an applicant to the practice of law on the grounds that he had not established his good character to the satisfaction of the state court.

This Court held that the grounds relied upon by the state court had no reasonable relationship to the issue before it, that its action in denying the applicant admission to the bar was not justified by evidence in the record and therefore such action was arbitrary and violative of the due process provisions of the Constitution of the United States, and that this Court had jurisdiction to review the action of the state court and order that the applicant be admitted to the bar.

In *Konigsberg v. State Bar of California*, 353 U. S. 252 (1957), this Court again reviewed the scope of state actions in relation to admission of applicants to the bar and by divided opinion again held in effect that its review was and is limited to whether or not the state action was so unrelated in reason to the matter before it and so arbitrary as to deprive the applicant of rights guaranteed by the Constitution of the United States.

In *Theard v. United States*, 354 U. S. 278 (1957), this Court reversed the action of the United States District Court striking an attorney from its rolls. The action of the District Court was based entirely upon the action of the state court disbarring the attorney, and this Court reversed the decision of the District Court on the ground that the action of the state court was not binding upon the federal courts and that the action of the state court was not in accord with "the principles of right and justice."

It seems to us that the rationale of this Court's decisions in the cases cited above is that the state courts have a large discretion in the matter of regulation of admissions to and expulsions from the bar but that actions by the state courts must be reasonably necessary and appropriate to the achievement of the legitimate objective of a bar composed of members who, as individuals, are learned in the law, possessed of good character and otherwise qualified to be entrusted with the responsibilities that devolve upon them as attorneys.

It seems to us also that it necessarily follows that a state court has a large discretion in regulating the

membership of the bar in the aggregate in such manner and by such means and by the imposition of such requirements as shall be reasonably calculated to achieve the legitimate objective of a state bar qualified, equipped and authorized to perform those functions and discharge those responsibilities which traditionally and historically are the functions and responsibilities of the organized bar.

It seems readily apparent that the day and age has long since passed when an attorney discharged in full his responsibilities to the courts, to the profession and to society when he discharges his responsibilities to his individual clients. In this age of social consciousness, it seems to us that larger duties devolve upon the bar which cannot be discharged by individual effort, but must be discharged by the profession acting in concert through an organization efficiently designed to discharge the responsibilities of the profession.

As individual lawyers we may strive for improvement in the administration of justice, we may exert our energies to raise the standards of ethical conduct, and we may individually give of our best to establish the profession in the confidence of the public but without the aid of our brothers of the bar acting in cooperation with us through effective organization we would fall far short of what in this new age is not only desirable but absolutely necessary.

The state courts have in increasing numbers found that the integrated bar is the best means yet devised and most reasonably adapted to the achievement of the

legitimate objective of providing an organization of the bar for effective discharge of the responsibilities of the bar.

Such action by such a large number of state courts brings the matter to this court with "title deeds of high respect."

The question of the validity of state action in relation to compulsory or integrated bar membership has never been before this Court, but we may look to the reason and logic of the decisions of this Court in comparable or analogous fields of law for precedent.

This Court has repeatedly held that the police power is only another name for that power which resides in every sovereign to pass all laws for the internal regulation and government of the state and that it comprises that portion of the sovereignty of the state which is not surrendered by the Federal Constitution to the Federal Government. *Mutual Loan Co. v. Martell*, 222 U. S. 224 (1911), *Slaughter-House Cases*, 83 U. S. (16 Wall) 36 (1872).

The Fourteenth Amendment was not designed and does not interfere with, curtail, destroy or take from the states the right and duty to exercise the police power nor limit the subjects to which it extends. *Terrace v. Thompson*, 263 U. S. 197 (1923); *Mugler v. Kansas*, 123 U. S. 623 (1887).

Police power extends to laws which promote the general welfare. *West Coast Hotel Co. v. Parrish*, 300

U. S. 379 (1936); *Nebbia v. New York*, 291 U. S. 502 (1933).

The states have the power under the police power to regulate any and all kinds of businesses, occupations and professions. *Nebbia v. New York*, 291 U. S. 502 (1933); *New State Ice Co. v. Liebmann*, 285 U. S. 262 (1931).

The power of the states to regulate or impose restrictions upon or make requirements relating to a business or profession is unquestioned. *McCloskey v. Tobin*, 252 U. S. 107 (1920); *Truax v. Raich*, 239 U. S. 22 (1915).

The limitation upon state action under the police power is that such action must be reasonable, be related to some subject within the power to regulate, be appropriate to the accomplishment of a legitimate objective, and must not arbitrarily or unreasonably impose upon the rights guaranteed by the Constitution of the United States. *Lemieux v. Young*, 211 U. S. 489 (1909); *New State Ice Co. v. Liebmann*, 285 U. S. 262 (1931).

State action under the police power comes to this Court with a presumption of validity and this Court will resolve every reasonable doubt in favor of validity of such action and in the absence of facts in the record to the contrary will assume the action of the state necessary and reasonable. *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U.S. 251 (1931).

Probably the most succinct statement of the proper operation of the police power and the scope of review

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No. 200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

TRAYTON L. LATHROP, APPELLANT

v.

JOSEPH D. DONOHUE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE STATES OF ARIZONA, IDAHO, OREGON, UTAH AND WYOMING AS AMICI CURIAE

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STATE OF WYOMING,
BY NORMAN B. GRAY
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President Wyoming State Bar

thereof by this Court was made by Mr. Justice Holmes in *Noble State Bank v. Haskell*, 219 U. S. 104 (1911), when he said:

> "Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

It would therefore appear from the logic and reasoning of this Court as evidenced by the principles enunciated in the foregoing cases that a state may, in the exercise of its police power, impose such reasonable restrictions upon any business or profession necessary to achieve or accomplish a legitimate objective.

Let us now examine another analagous field of law.

From the earliest days of the Union, it has been recognized that congress many regulate and impose restrictions upon federal employees and officers, even though such regulations and restrictions infringe upon the rights guaranteed by the Federal Constitution. *Ex Parte Curtis*, 106 U. S. 371 (1882); *United States v. Wurzbach*, 280 U. S. 396 (1930).

In the more recent case of *United Public Workers v.*

Mitchell, 330 U. S. 75, 95, 96, 100, 101 (1947), this Court upheld the Hatch Act and in so doing said:

> "Thus we have a measure of interference in the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment. Appellants' objections under the Amendments are basically the same.
>
> "We do not find persuasion in appellants' argument that such activities during free time are not subject to regulation even though admittedly political activities cannot be indulged in during working hours. The influence of political activity by government employees if even in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours. Of course, the question of the need for this regulation is for other branches of government rather than the courts. Our duty in this case ends if the Hatch Act provision under examination is constitutional.
>
> "Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes. The requirements of residence and age must be met. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal

power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.

"As pointed out hereinbefore in this opinion, the practice of excluding classified employees from party offices and personal political activity at the polls has been in effect for several decades. Some incidents similar to those that are under examination here have been before this Court and the prohibition against certain types of political activity by office holders has been upheld. The leading case was decided in 1882. Ex parte Curtis, 106 U. S. 371, 27 L ed 232, 1 S Ct 381. There a subordinate United States employee was indicted for violation of an act that forbade employees who were not appointed by the President and confirmed by the Senate from giving or receiving money for political purposes from or to other employees of the government on penalty of discharge and criminal punishment. Curtis urged that the statute was unconstitutional. This Court upheld the right of Congress to punish the infraction of this law. The decisive principle was the power of Congress, within reasonable limits, to regulate, so far as it might deem necessary, the political conduct of its employees."***

* * *

"Appellants urge that federal employees are protected by the Bill of Rights and that Congress may

not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on congressional power but, because there are some limitations, it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid. A reading of the Act and Rule 1, notes 2 and 6, supra, together with the Commission's determination shows the wide range of public activities with which there is no interference by the legislation. It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success.

"It is urged, however, that Congress has gone further than necessary in prohibiting political activity to all types of classified employees. It is pointed out by appellants 'that the impartiality of many of these is a matter of complete indifference to the effective performance' of their duties. Mr Poole would appear to be a good illustration for appellants' argument. The complaint states that he is a roller in the Mint. We take it this is a job calling for the qualities of a skilled mechanic and that it does not involve contact with the public. Nevertheless, if in free time he is engaged in political activity, Congress may have concluded the the activity may promote or retard his advancement or preferment with his superiors. Congress may have thought that Government employees are handy elements for leaders in political policy to use in building a politi-

cal machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. There are hundreds of thousands of United States employees with positions no more influential upon policy determination than that of Mr. Poole.

"Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us and unconstitutional basis for legislation."

If Congress has the power to enact legislation to limit the exercise of constitutional rights of a person employed as a mechanic in the Mint because the "presence of government employees *** in the ranks of political party workers is bad" then it appears to us that the highest court of a state has equal power to impose restrictions and restraints upon those admitted to practice law in order to coordinate the efforts of the profession to better achieve and accomplish those purposes which only the organized bar can achieve and accomplish in service to the public, service in the administration of justice, and service to the profession.

Let us now examine another field of law which may be of aid in the proper determination of this cause.

In *Railway Employees Dept. v. Hanson*, 351 U. S. 225, 233, 234 (1956), this Court had before it the question of the validity of an act of Congress permitting a railroad and a labor organization to enter into a "union or closed shop" contract and the further question of whether or

not such act of Congress superseded the "right to work" laws of a state.

In disposing of these two questions, this Court said:

"In the absence of conflicting federal legislation, there can be no doubt that it is within the police power of a State to prohibit the union or the closed shop. We so held in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.* 335 U. S. 525, 93 L ed 212, 69 S Ct 251, 260, 6 ALR 2d 473, and in *A. F. of L. v. American Sash & Door Co.* 335 U. S. 538, 93 L ed 222, 69 S Ct 258, 260, 6 ALR 2d 481, against the challenge that local 'right to work' laws, including Nebraska's, violated the requirements of due process. But the power of Congress to regulate labor relations in interstate industries is likewise well-established. Congress has authority to adopt all appropriate measures to 'facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.' *Texas & N.O.R. Co. v. Brotherhood of R. & S.S. Clerks,* 281 U. S. 548, 570, 74 L ed 1034, 1046, 50 S Ct 427. These measures include provisions that will encourage the settlement of disputes 'by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them.' (*Virginian R. Co. v. System Federation, R.E.D.* 300 U. S. 515, 548, 81 L ed 789, 800, 57 S Ct 592), and that will protect the employees against discrimination or coercion which would interfere with the free exercise of their right to self-organization and representation. *NLRB v. Jones & L. Steel Corp.* 301 U. S. 1, 33, 81 L ed 893, 909, 57 S Ct 615, 108 ALR 1352. Industrial peace along the arteries of commerce is a legitimate objective; and Congress

has great latitude in choosing the methods by which it is to be obtained.

"The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one. Much might be said pro and con if the policy issue were before us. Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. Mr. Justice Brandeis, who had wide experience in labor-management relations prior to his appointment to the Court, wrote forcefully against the closed shop. He feared that the closed shop would swing the pendulum in the opposite extreme and substitute 'tyranny of the employee' for 'tyranny of the employer.' But the question is one of policy with which the judiciary has no concern, as Mr. Justice Brandeis would have been the first to concede. Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which congress exercises." ***

We submit that the above principles and precedents control the case at bar and establish without question the power of the Supreme Court of Wisconsin to create an integrated bar in that state.

CONCLUSIONS

(1) A state, in the exercise of its sovereign powers, subject to the limitations of the Federal Constitution, has full power to regulate the practicing of law in such state.

(2) The courts of the state may exercise the powers of the state, either as a matter of inherent power or by express delegation of such power, to regulate, control and direct matters relating to the bar of the state and the members thereof.

(3) The rights of free association, freedom of speech and protection of property guaranteed by the Federal Constitution are not absolute rights but are relative only and may be reasonably regulated, modified, or restrained in the public interest to attain a legitimate objective.

(4) State action in the matter of regulation of the state bar comes to this court with a presumption of validity and if it appears that the purpose of such regulation is legitimate, and the means adopted are reasonable, this court will not interfere or disturb the states action.

(5) The action of the Wisconsin Supreme Court is designed to accomplish a legitimate objective; the method adopted to accomplish that objective is reasonable and is within the recognized sphere of state action; is within the permissable limits established by the Fed-

eral Constitution and in accord with constitutional principles enunciated by this court in numerous decisions.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that copies of this brief have been served upon counsel for appellant and for appellee by mail by depositing the same in a United States Post Office mail box addressed to counsel for appellant as follows: John W. Reynolds, Attorney General of Wisconsin, State Capitol, Madison 2, Wisconsin, and to counsel for appellee as follows: Leon E. Isaksen, Room 305, 122 West Washington Avenue, Madison 3, Wisconsin, the same being the post office addresses of such counsel; that sufficient air mail stamps were placed thereon to insure delivery; that such briefs addressed and stamped as aforesaid were deposited in the United States mail as aforesaid on the 23 day of December, A. D. 1960, in Tallahassee, Florida, at approximately 2 o'clock P.m. of said date.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 200

TRAYTON L. LATHROP, APPELLANT

v.

JOSEPH D. DONOHUE, APPELLEE.

APPEA. FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE STAT 3 OF ARIZONA, IDAHO, OREGON, UTAH AND WYOMING AS AMICI CURIAE

OPINION BELOW

The opinion of the Circuit Court of the State of Wisconsin is unreported, and will be found in the Record at pages 49-63. The opinion of the Supreme Court of Wisconsin is reported at 10 Wis. 2d 230, and will be found in the Record at pages 66-81.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on April 5, 1960 (R. 65-66), upholding the validity of its orders of December 7, 1956 and December 22, 1958, integrating the State Bar on a permanent basis and determining that they do not violate the Fourteenth Amendment to the United States Constitution and are constitutional, thereby affirming the decision of the Circuit Court. Notice

of appeal was filed on May [redacted] 1960 (R. 82); and the question of jurisdiction was postponed to the hearing of the case on the merits by order of this Court of October 10, 1960 (R. 85). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (2) unless as appellant asserts "it can be said that [the Rules of the Supreme Court of Wisconsin integrating the State Bar] do not constitute a statute" within the meaning of 28 U. S. C. 1257 (2). Brief of Appellant at p. 3.

QUESTION PRESENTED

Whether the integration of the State Bar by the orders and rules of the Supreme Court of Wisconsin in the exercise of its inherent power to supervise the legal profession of the State violates any of appellant's rights under the Fourteenth Amendment.

SCOPE OF THIS BRIEF

This brief is limited to a discussion of (1) the power of each of the States named to integrate its Bar by legislative enactment as well as by rules and regulations promulgated and adopted by the Judiciary in the exercise of its inherent supervisory power over the legal profession of the State, (2) the authority so to provide that all members of its legal profession in good standing shall be admitted to the Integrated Bar as a condition precedent to the practice of the law in the State, and (3) the right also so to provide for the imposition of a reasonable periodic license fee from all of the members of the Integrated Bar as a financial aid in carrying out its purposes and functions set forth in the enabling Acts and in the rules and regulations promulgated and adopted by the Judiciary in the exercise of its inherent power over the legal profession.

INTEREST OF THESE STATES

It is believed essential to present to this Court for its consideration in connection with its deliberations of the issues raised in the *Wisconsin* case that, in the valid exercise of their plenary powers by statute and rules of the Judiciary, at least these States have made all necessary provision for the preservation and protection of the interests and welfare of the public, the administration of the law, and the memberships of these Integrated Bars. In no respect do these enabling Acts and Rules impinge or offend any constitutional rights and privileges of the members, individually or collectively, such as claimed by the appellant in the instant case. The activities of the governing bodies are supervised by the Judiciary as well as by the memberships of these Integrated Bars to prevent any abuse or usurpation of the granted power under which they must operate pursuant to the laws and Judicial Rules prescribing their functions and responsibilities.

SUMMARY OF THE ARGUMENT

I. The integration of the Bar by the State, whether by legislative enactment or by Judicial Rule or both, is valid, and does not infringe any rights of its membership under the Federal Constitution.

Admission to practice in a State and before its courts necessarily belongs to that State. The courts' control over a lawyer's professional life derives from his relation to the responsibilities of a court.

II. The enabling Acts and Judicial Rules of these States constitute a necessary and reasonable exercise of their state powers.

It is settled law that a State by enactment of its legislature and by the inherent power of its Judiciary through

rules and regulations is endowed with great discretion and latitude in establishing an Integrated Bar to protect the interests of the public, its own interests, those of its Judiciary and the legal profession of the State as a whole, and this power extends to the administration of the law, procedure and practice, and in aiding the advancement of the science of jurisprudence.

III. The Integrated Bar has proved to be successful for nearly forty years in supervising the activities of the entire membership in the practice of the legal profession and in performing the functions prescribed by state law for the general welfare of the public, the advancement of the administration of the law, as well as for the benefit of the membership.

More than half of the States have proved beyond question the value of the system of the Integrated Bar as an agency of those States and their Judiciary, in the performance of the functions for which they have been established, without infringing or offending the rights of those within the orbit of their functions and operations. The Integrated Bar has proved so successful that no State which has adopted it has changed back to a voluntary form of organization. The validity under the Federal Constitution of the State Integrated Bar system has been upheld in every State where the question has arisen.

IV. This Court in the *Hanson* case, 351 U. S. 225, in substance and effect has ruled that the integration of the Bar by a State is valid in all respects.

In that case it was said that there is no more an infringement or impairment of First Amendment rights in a "closed shop" contract, made by a union under a Federal Act, than there would be in the case of a lawyer who, by state law, is required to be a member of an Integrated Bar.

V. The Integrated Bar is a self-governing organization subject to the supervision of the Judiciary of the State.

The enabling Acts and the Judicial rules and regulations of the States afford ample provision for the membership of the Integrated Bar, individually and collectively, at annual and other meetings of its Bar and in other ways, to voice their objections to any of the activities of the officers of the Integrated Bar, and the governing body of this system cannot abuse its power since at all times it is under the effective supervisory control of the Judiciary of the State.

VI. In integrating its Bar it is for the State to select the ways and means by which the purposes and functions, prescribed by law and court rule, shall be financed to carry out the mandates thereof, and the imposition of a reasonable periodic license fee on the membership is valid.

The *Hanson* case upheld the right of the union operating under the authority of a Federal Act to impose and collect periodic dues, initiation fees and assessments for the financial support of the collective-bargaining agency from all who receive the benefits of its work, and the reasoning of this Court upon which it based that ruling applies with equal force and effect to the authority of a State and its Judiciary to provide likewise for the financial support of its Integrated Bar in its performance of the functions prescribed by the enabling Act and the rules and regulations of its courts.

VII. The use of funds derived from the license fees is valid, since the use enables the governing body to carry out all of the activities authorized by law and the rules of court, subject to appropriate Judicial supervision of the State Bar when integrated.

At least the States, which have joined in this brief, in integrating their Bars have prescribed reasonable and necessary functions and fields of activity of the officers and governing bodies which compels the view that the license fees collected periodically must be used exclusively in carrying out the duties and responsibilities imposed thereby and not otherwise. Since the use of the funds are at all times under the supervision of the Judiciary of the States, and of the memberships of their Bars, there can be no imputation that such use will be abused or usurped so as to infringe upon or offend any constitutional rights of any of the members thereof.

ARGUMENT

I

THE INTEGRATION OF THE BAR BY THE STATE, WHETHER BY LEGISLATIVE ENACTMENT OR BY JUDICIAL RULE OR BOTH, IS VALID, AND DOES NOT INFRINGE ANY RIGHTS OF ITS MEMBERSHIP UNDER THE FEDERAL CONSTITUTION.

The States of Arizona, Idaho, Oregon, Utah and Wyoming have integrated their Bars by statute, supplemented by rules and by-laws or regulations promulgated, approved and adopted by the Supreme Court of each State.

Arizona integrated its Bar in 1933; *Idaho* in 1923; *Oregon* in 1935; *Utah* in 1931; and *Wyoming* in 1939. More than half of the States have integrated their Bars and they are listed in a footnote on page 47 of Appellants' Brief in *International Association of Machinists* v. *Street*, No. 4, October Term, 1960, on the Docket of this Court, and set for argument immediately preceeding the case at bar.

The constitutional right of a State to integrate its Bar is well-settled whether accomplished by statute or rule of court, or by both as in the case of *Wyoming*. Wyo. Stat. 1957 Ann., §5-22 (B), and Rule 1 *et seq.*, Supreme Court,

id., Vol. 2, p. 23. In the instant case the Wisconsin Supreme Court elected to use its inherent power to integrate its State Bar by its orders and rules, instead of adopting the provision therefor enacted by its legislature, the court stating that the Act was merely "a declaration" or "an expression of public policy." *In re Integration of Bar*, 249 Wis. 523, 530; *In re Integration of Bar*, 273 Wis. 281, 283. In this connection that court said of the use of the inherent power: "It has been held by every court to which the question has been presented that the court has power to integrate the bar and that the integration of the bar is a judicial and not a legislative function." *Integration of Bar Case*, 244 Wis. 8, 40, citing among other cases *In re Integration of Nebraska State Bar* (1937), 133 Neb. 283. Continuing that court further said: "The power to integrate the bar is an incident to the exercise of the judicial power which is vested by the constitution of the state of Wisconsin in the supreme court . . . Judicial power is not reposed by the constitution in the legislature, hence it cannot delegate it." 244 Wis., at 40-41. Therefore, whether the practice of law is a natural or constitutional right or a privilege, and regardless of how the State's grant of permission to engage in this profession is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239. That case recognized in effect the right of the State to integrate its Bar. In his concurring opinion MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE CLARK and MR. JUSTICE HARLAN joined, stated:

> "From the thirteenth century to this day, in England the profession itself has determined who should enter it. In the United States the courts exercise ultimate control. But while we have nothing compar-

able to the Inns of Court, with us too the profession itself, through appropriate committees, has long had a vital interest, as a sifting agency, in determining the fitness, and above all the moral fitness, of those who are certified to be entrusted with the fate of clients. With us too the requisite 'moral character' has been the historic unquestioned prerequisite of fitness. Admission to practice in a State and before its courts necessarily belongs to that State. Of course, legislation laying down general conditions of an arbitrary or discriminatory character may, like other legislation fall afoul of the Fourteenth Amendment. . . .

"It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular State for admission to its bar. . . . Especially in this realm it is not our business to substitute our judgment for the State's judgment—for it is the State in all the panoply of its powers that is under review when the action of its Supreme Court is under review." 353 U. S., at 248.

As pointed out by Winters, Bar Association Organization and Activities (1954 ed.), at p. 5:

"The leading reason for an integrated bar is simply that the bar as a whole needs an organization . . . . Integration of the bar is simply a matter of giving to this already existing group the instrumentalities which it needs for self-expression and for action in the name of and in accordance with the will of the group.

"No other organization can serve that purpose, and certainly not an unofficial, voluntary organization of a portion of the group consisting of those

members who . . . have been persuaded to go into it." *Id.* at p. 5.

As the author points out, in the integrated states the Bar polices its own ranks. This he states has "proved efficient and effective, and it contributes greatly to the high morale of the bar, for self-government is the American way." *Id.* at p. 6.

MR. JUSTICE FRANKFURTER, speaking for this Court, in *Theard* v. *United States*, 354 U. S. 278, 281, said:

> ". . . While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context ers are included. The court's control over a lawy professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. 'Membership in the bar is a privilege burdened with conditions' (*Matter of Rouss*, 221 N. Y. 81, 84, 116 N. E. 782, 783). 'The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470-471, 162 N. E. 487, 489."

Mr. Justice Cardozo in the same case also stated: "Compliance with that condition [a fair private and professional character] is essential at the moment of admission; but it is equally essential afterwards . . . Whenever the condition is broken, the privilege is lost." 221 N. Y. 81, 84-85.

In the case of *In re Isserman*, 345 U. S. 286, 289, Mr. Chief Justice Vinson stated: "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice."

In *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225, involving the question of whether a "closed shop" agreement between a union and an interstate railroad, entered into pursuant to the provisions of '2, Eleventh, of the Railway Labor Act, requiring employes to join the union and pay dues periodically, violated the First Amendment of the Federal Constitution, MR. JUSTICE DOUGLAS speaking for the Court, at pages 236-238, said:

> "Wide-ranged problems are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights. It is said that once a man becomes a member of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology.
>
> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."

II

THE ENABLING ACTS AND JUDICIAL RULES OF THESE STATES CONSTITUTE A NECESSARY AND REASONABLE EXERCISE OF THEIR STATE POWERS.

It is settled law now that a State by the enactment of its legislature and by the inherent power of its Judiciary by its rules and regulations must of necessity be endowed with great discretion and latitude in establishing an Integrated Bar so as to protect the interests of the public, its own interests, those of its Judiciary and the legal profession of the State as a whole, and this power extends to the administration of the law and the procedure and practice by which the Integrated Bar must be bound as an entity. And the task of the Judiciary ends once it appears that the legislative measures adopted and the rules of the Judiciary made pursuant thereto are relevant and appropriate and within the police power of the State and the inherent power of its Judiciary.

Ever since 1921 when North Dakota became the first State to have an Integrated Bar, none of 27 State Bars now in operation "has changed back permanently to a voluntary form of organization." So states the appellee in the instant case in his brief, at page 14, in support of his motion to dismiss this appeal, citing "Supreme Court Justices Present Views on Bar Integration," 25 Jour. Am. Jud. Soc., 91, 126, 159.

The legislative measures and the Judicial adoption of rules and regulations made pursuant to and in conformity with the statutory provisions are necessary, germane to the purposes for which the Integrated Bars, of at least the States who have joined in this brief, have been established, and are appropriate to enable each of the organizations to function to the fullest extent contemplated thereby, they

are therefor within the constitutional authority of these States and their Judiciary as will be readily seen by reviewing the provisions of law and the judicially approved rules and regulations to which the attention of this Court is now called.

Arizona integrated its Bar in 1933.

Sec. 32-201, Ariz. Rev. Stat. Ann., provides that the State Bar shall be a public corporation subject to change or termination at any time. Its Supreme Court has decided these statutory provisions do not restrict the inherent power of the judiciary. *In re Sullivan* (1946), 64 Ariz. 337, 170 P. 2d 614; *In re Van Bever* (1940), 55 Ariz. 368, 101 P. 2d 790.

Other pertinent provisions are:

Sec. 32-237 which sets forth the powers of the State Bar, paragraph 2 reading:

"Formulate and enforce, with approval of the supreme court, rules of professional conduct for members of the bar in the state."

Paragraph 3 provides:

"Aid in the advancement of the science of jurisprudence and improvement of the administration of justice."

Sec. 32-264 provides that the rules and regulations of the Board of Governors when approved by the Supreme Court shall be binding on the members of the State Bar and wilful violation or breach thereof shall be punished as that court directs.

Sec. 32-261 provides:

"No person shall practice law in this state unless he is an active member of the state bar in good standing as defined in this chapter."

The case of *In re Greer* (1938), 52 Ariz. 385, 81 P. 2d 96, decides that the right to practice law is not a natural nor constitutional one, and is considered as a privilege only, bestowed upon certain persons, primarily for the benefit of society, upon such terms and conditions as the State may fix. See also *In re Gibbs* (1929), 35 Ariz. 346, 278 P. 371.

Sec. 32-263 sets forth the duties of an attorney.

Sec. 32-275 provides:

"This chapter shall not be construed to limit the supreme court's common law jurisdiction with respect to admitting and disciplining members of the bar of the supreme court."

Idaho integrated its bar in 1923.

Sec. 3-401, Idaho Code Ann., provides:

"Recognizing that the practice of the legal profession is a privilege granted by the state and not a natural right of the individual, it is deemed necessary as a matter of business policy and in the interests of the public to provide laws and provisions covering the granting of that privilege and its subsequent use, control and regulation to the end that the public shall be properly protected against unprofessional, improper and unauthorized practice of law and unprofessional conduct of members of the bar."

The integration of the State Bar was held constitutional in the case of *In re Edwards*, 45 Idaho 676, 266 P. 665.

Sec. 3-405 declares that all persons admitted to the practice of law and are in good standing shall thereby become members of the Idaho State Bar.

Sec. 3-402 provides for the organization of the State Bar Board of Commissioners.

Sec. 3-407 prescribes the powers of the Board and authorizes it to adopt rules and by-laws subject to the approval of the Supreme Court.

Sec. 3-418 provides:

"The governor, Supreme Court, or the legislature of the State of Idaho, may request of the board an investigation and study of and recommendations upon any matter relating to the courts of this state, practice and procedure therein, practice of the law, and the administration of justice in Idaho . . . The board may, without such request, cause an investigation and study upon the same subject-matters, and after a report thereon to an annual meeting of the Idaho State Bar, report the same and the action of said meeting thereon to the governer, Supreme Court or the legislature . . ."

Sec. 3-419 provides:

"The Idaho State Bar and its board of commissioners shall have the power and authority to aid in the advancement of the science of jurisprudence and in the improvement of the administration of justice."

Sec. 3-413 provides that the rules and regulations made by the Board shall be approved by the Supreme Court.

Oregon integrated its Bar in 1935.

Sec. 9.010, Ore. Rev. Stat., as amended, provides:

"An attorney, admitted to practice in this state, is an officer and the Oregon State Bar is authorized to carry out the provisions [of certain statutory Acts]."

Sec. 9.080 defines the duties of the Board of Governors providing:

". . . The board is charged with the executive functions of the state bar and shall at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice. . . ."

Sec. 9.130 provides:

"At any meeting of the state bar the members present, by a majority vote, may modify or rescind any action or decision of the board of governors and also may instruct the board as to future action, and the board shall be bound by any such action of the bar. . . ."

Sec. 9.160 provides:

". . . no person shall practice law or represent himself as qualified to practice law unless he is an active member of the Oregon State Bar."

Sec. 9.490 provides:

"The board of governors, with the approval of the state bar given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have the power to enforce the same. Such rules shall be binding upon all members of the bar."

Sec. 9.110 provides:

"The board may formulate and declare rules and regulations necessary or expedient for carrying out the functions of the Oregon State Bar . . ."

Article II of the By-Laws of the Oregon State Bar provides:

"The state bar shall foster the following purposes, namely:

"To cultivate and advance the science of jurisprudence;

"To promote reform in the law and in judicial procedure;

"To facilitate the administration of justice;

"To uphold and elevate the standard of honor, of integrity and of courtesy in the legal profession;

"To encourage higher and better education for membership in the profession and to increase the usefulness and efficiency of the bar; and

"To promote a spirit of cordiality and brotherhood among and render all proper service to the members of the bar."

Utah integrated its Bar in 1931.

Sec. 78-51-1, Utah Code Ann., 1953, provides:

"All persons . . . duly admitted to practice as an attorney and counselor at law in the Supreme Court of this state are qualified to be members of the Utah state bar, subject to the provisions of this title."

Sec. 78-51-13 provides:

"The board shall also have the power to make or cause to be made an investigation into and upon all unethical, questionable, or improper conduct of members of the bar holding judicial office and to make recommendations to the legislature with respect thereto."

Sec. 78-51-14 provides:

"All rules and regulations made by the board shall be submitted to and approved by the Supreme Court."

Sec. 78-51-19 provides:

"... Nothing in this title contained shall be construed as limiting or altering the powers of the courts to disbar or discipline members of the bar."

Sec. 78-51-20 provides:

"The governor, the Supreme Court and the legislature may request of the board an investigation and study of and recommendations upon any matter relating to the courts of this state, practices and procedure therein, practice of the law, and the administration of justice, and thereupon it shall be the duty of said board to cause such investigation and study to be made, to report thereon to an annual meeting of the Utah state bar, and, after the action of the said meeting thereon, to report the same to the officer or body making the request. The board may, without such request, cause an investigation and study upon the same subject matters, and, after a report thereon to an annual meeting of the Utah state bar, report the same and the action of said meeting thereon to the governor, the Supreme Court, or the legislature."

Sec. 78-51-9 provides:

"The board of commissioners shall have power to adopt by-laws, not in conflict with any of the terms of this title, concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the board and of the Utah state bar."

Sec. 3-6 of the By-Laws of the Utah State Bar provides:

"The Board of Commissioners, vested with all the powers necessary or incidental to the control and

administration of the business and affairs of the Utah State Bar as provided by law subject to control by the Supreme Court, may at any time by majority vote of its membership, and when directed so to do at the Annual Meeting shall, refer and submit to the membership of the Utah State Bar or to the membership of a Section or unit thereof, defined questions affecting the substance or the administration of the law, or affecting the policy of the Utah State Bar, which in the opinion of the Board are of immediate practical consequence to the legal profession or the public of the State of Utah. The result of a referendum, when duly ascertained, shall control the action of the Bar, its Officers, Sections, Committees, units, agents and employes."

Wyoming integrated its Bar in 1939.

Sec. 5-22, Wyo. Stat. 1957 Ann., provides:

"The supreme court of Wyoming shall, from time to time promulgate such rules and regulations as the court may see proper:

. . . . . .

"(B) Organizing and governing a bar association of the attorneys at law of this state to act as an administrative agency of the supreme court of Wyoming for the purpose of enforcing such rules and regulations as are prescribed, adopted, and promulgated by the supreme court under this act, providing for the government of the state bar as a part of the judicial department of the state government and for such divisions thereof as the supreme court shall determine, and requiring all persons practicing law in this state to be members thereof in good standing, and fixing the form of its organization and operation."

The rules of the Supreme Court of Wyoming providing for the organization and government of its Bar will be found in Vol. 2, Wyo. Stat. 1957 Ann. p. 23 *et seq.*, and the By-Laws at p. 29 *et seq.*

Rule 1 states that the name shall be the "Wyoming State Bar."

"Rule 2. Membership.—All persons who are now or shall hereafter be admitted to practice as attorneys at law in this State under and pursuant to the laws thereof and who shall have paid their license fees shall constitute and be members of the State Bar, and shall be subject to the provisions of these rules."

Rule 6 establishes a Board of Commissioners and provides:

> ". . . The Board shall act as the administrative agent of the Supreme Court for the purpose of enforcing such rules and regulations as are prescribed, adopted and promulgated by the Supreme Court under the aforesaid Act."

Rule 13 prescribes the duties of the Commissioners relative to unethical practices or of unprofessional or improper conduct on the part of any member of the State Bar.

Rule 17 affords only active members in good standing in the State Bar the right to vote or to hold office in the State Bar.

"Rule 12. Authority of board.—The Board is the administrative and executive agency of the State Bar and shall have power, subject to the approval of the Supreme Court, to adopt by-laws not in conflict with these rules, regulating the selection of its officers and the terms of its committees and their powers and

duties, and regulating the transaction of the business of The Board and the State Bar. The Board shall likewise have the power to promote or maintain the printing and distribution of reports, pamphlets and other publications designed to educate and inform the State Bar and the public.''

Careful examination will disclose that the statutory provisions supplemented by the rules and regulations promulgated and approved by the Judiciary are designed to afford all the power and authority necessary, at least for these States, to integrate their Bars as the best known system so far devised for a State and its Judiciary to protect successfully (1) the interests of the public, the State, the Judiciary, the administration of justice, those of its membership, individually and collectively, by its supervisory authority relative to the practice of the law, (2) to engage in activities intended to advance the science of jurisprudence, with the Judiciary, by statute or by its inherent power, acting at all times in a supervisory capacity as guardian of all the activities of the Bar so as to insure that none engages in pursuits outside of the realm of the power and authority defined by law.

III

THE INTEGRATED BAR HAS PROVED TO BE SUCCESSFUL FOR NEARLY FORTY YEARS IN SUPERVISING THE ACTIVITIES OF THE ENTIRE MEMBERSHIP IN THE PRACTICE OF THE LEGAL PROFESSION AND IN PERFORMING THE FUNCTIONS PRESCRIBED BY STATE LAW FOR THE GENERAL WELFARE OF THE PUBLIC AND THE ADVANCEMENT IN THE ADMINISTRATION OF THE LAW AS WELL AS FOR THE BENEFIT OF THE MEMBERSHIP.

Since its inception in 1921, the system of Integrated Bars now adopted by more than half of the States has proved beyond question its value as an agency of those

States and their Judiciary, selected to perform the functions for which they have been established without infringing or offending the constitutional rights of those within the orbit of their functions and operations. An Integrated Bar protects jealously not alone the interests of the membership as a whole, but with equal force and effect those of each member, *all* under the supervisory power of the Judiciary and the legislative enactments.

Appellee, in the case at bar, at page 14 of his brief in support of his motion to dismiss the appeal, states that the Integrated Bar system has proved so successful no state which has adopted it has changed back permanently to a voluntary form of organization, and, at pages 18-20 of the same brief, further states that the validity under the Federal Constitution of the Integrated Bar system has been upheld in every State where the question has arisen. See cases collected in 114 A. L. R. 161 and 151 A. L. R. 617 supplemented by citations at page 614, Vol. 3, A. L. R. Blue Book (1952-1958) and 1960 A. L. R. Blue Book at page 222.

IV

THIS COURT IN THE HANSON CASE HAS RULED IN SUBSTANCE AND EFFECT THAT THE INTEGRATION OF THE BAR BY A STATE IS VALID IN ALL RESPECTS.

This Court, in the case of *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225, in substance and effect has upheld the validity of the Integrated Bar under the Federal Constitution. In that case this Court upheld a railroad union shop agreement made under the Railway Labor Act, requiring *all* employees to belong and pay periodic dues to a union. In answer to the argument that a union shop agreement forces men into ideological and political associations which violate the right to freedom of conscience, association

and thought protected by the Bill of Rights, that once a man becomes a member of these unions he is subject to vast disciplinary control, and that by force of the Federal Act a union now can make him conform to their ideology, MR. JUSTICE DOUGLAS for this Court, at page 238, said:

> "On the present record, *there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.*" (Italics supplied.)

The ruling and the reasons therefor made by this Court in the *Hanson* case upholding the action taken by a union under a Federal Act applies with equal force and effect to the integration of a State Bar under state law, regardless of whether accomplished by the exercise of its police power through statutory enactments or by judicial rules. The result must be the same since the only real difference is that the authority on the one hand came from a valid *Federal* source and on the other from a valid *State* source. This perhaps suggested itself to this Court in that case by its recognition of the striking similarity of a union "closed shop" agreement under a valid Federal Act and the integration of a Bar by valid State Enactments and Judicial Rules and Regulations. This analogy is discussed at length in the brief for the appellants (pages 44-48), in the case of *International Association of Machinists, et al.* v. *S. B. Street, et al.*, No. 4, October Term 1960, on the Docket of this Court, which is on appeal from the Supreme Court of Georgia, and set for argument immediately preceding the instant case.

V

THE INTEGRATED BAR IS A SELF-GOVERNING ORGANIZATION SUBJECT TO THE SUPERVISION OF THE JUDICIARY OF THE STATE.

The Integrated Bar is a self-governing Bar. Provision is made for the election of officers by the membership of the Bar; annual meetings are to be held at which the officers and committees of the Integrated Bar are to make their reports. Ariz. Rev. Stat. Ann. (1956), §§32-233, 32-241; Idaho Code (1947), §§3-403, 3-417; Ore. Rev. Stat., §§9.020, 9.030, 9.040, 9.120, 9.130; Utah Code Ann. 1953, §§78-51-5, 78-51-6, 78-51-8, By-Laws 1-1 through 3-7; Wyo. Stat. 1957, §5-22, Rules of Supreme Court of Wyo., Nos. 7-10. At the meetings the membership of the State Bar rule by majority vote, although individual members or by group can voice their objections to activities of the Integrated Bar. See Ore. Rev. Stat., §9.130; Utah, §3-6 of By-Laws, *supra,* at p. 17. The governing body of the Integrated Bar cannot abuse its power since at all times it is under the supervisory control of the Judiciary of the State. Indeed every member in an Integrated Bar is afforded an opportunity to do his share in carrying out the public service of the Bar, and to bear his portion of responsibility as a member.

VI

IN INTEGRATING ITS BAR IT IS FOR THE STATE TO SELECT THE WAYS AND MEANS BY WHICH THE PURPOSES AND FUNCTIONS PRESCRIBED BY LAW AND COURT RULE SHALL BE FINANCED TO CARRY OUT THE MANDATES THEREOF, AND THE IMPOSITION OF A REASONABLE PERIODIC LICENSE FEE ON THE MEMBERSHIP IS VALID.

In the case of *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225, 235, involving the question of the validity of §2, Eleventh, of the Railway Labor Act, authorizing a union

to collect periodic dues, initiation fees, and assessments, but no fines and penalties, MR. JUSTICE DOUGLAS for this Court said: "The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary." And at page 238, it is further stated: "Congress endeavored to safeguard against [the impairment of freedom of expression] by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments'." Concluding, the opinion at page 238 states: "For we pass narrowly on §2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments."

The reasoning of this Court in the *Hanson* case as to the validity of the Federal Act to empower a union to collect dues, initiation fees and make assessments, applies in all respects with equal force and effect to an enactment by the legislature of a State and rules and regulations by its Judiciary integrating its Bar, the legislature exercising its police power and the Judiciary its inherent power. It is a valid exercise of those powers to provide that the membership of the Integrated Bar contributes a fair and reasonable license fee towards the expense of maintaining the professional organization so established by law; and it has been so held by the courts which have considered the question since to do so is clearly within the realm of the authority in connection with the integration of a Bar. See Brief for Appellants in *International Association of Machinists* v. *Street, supra,* at page 46, where this matter is discussed in support of the collection and use of dues by a

union under a "closed shop" contract as involved also in the *Hanson* case, and the cases cited in support of this argument. The financing of the Integrated Bar in fact is so essential that without such aid it would cease to function in the manner for which it was designed and intended by the State. One of the many weaknesses of the voluntary association of the practitioners of the law was the inadequate financing of the work of the Bar when a small group undertakes to carry a burden which experience has proved must rest on the entire profession. See Winters, Bar Association Organization and Activities, pp. 6, 8, and cases collected in note 14 on page 8. If the license fee prescribed and imposed and collected periodically is fair, reasonable and just, its validity is beyond question since it is definitely germane to the principal purposes for which the Bar is integrated, and is just as much a part of the policy exercised by the State and the inherent powers of the Judiciary as are all the other provisions for the integration of the Bar. In fact the one—integration of the Bar—cannot stand without the other—the adequate financing of the Integrated Bar—in order to carry out *all* of its prescribed functions under the supervision of the Judiciary.

VII

THE USE OF FUNDS DERIVED FROM THE LICENSE FEES IS VALID, SINCE THE USE ENABLES THE GOVERNING BODY TO CARRY OUT ALL OF THE ACTIVITIES AUTHORIZED BY STATE LAW AND RULES OF COURT, SUBJECT TO APPROPRIATE JUDICIAL SUPERVISION OF THE STATE BAR WHEN INTEGRATED.

The very fact that the States subscribing to this brief have prescribed reasonable and necessary functions and fields of activity of the governing bodies in integrating their Bars compels the view that the fees collected thereunder must be used exclusively in carrying out the duties and responsibilities imposed thereby, and not otherwise.

As has been seen the Judicial supervision of the Integrated Bar and the voting power afforded its membership at meetings will prevent any activity by all of the officers of the Bar to step outside the limits of their prescribed functions. In the brief for the United States filed in *International Association of Machinists* v. *Street, supra,* at pages 37-38, it is stated:

> "The primary contention made by appellees here, and accepted by the courts below, is that, by spending a substantial part of the fees and dues collected from appellees for the disputed objectives, the unions are depriving appellees of their constitutional rights. The offensive feature of the unions' activity is claimed to be the expenditure of the fees and dues, not merely their collection. They object to being forced to support political candidates and measures they prefer to reject. Thus, if appellees' fees and dues were used exclusively for the negotiation, maintenance, and administration of collective bargaining agreements, appellees would have no objection, *and at any rate the whole case would be plainly governed by Hanson.* (Italics supplied.)

In its brief, appellants in *International Association of Machinists* v. *Street, supra,* at pages 46-47, states:

> "The arguments which have been rejected by the courts in upholding integration of the bar and suspending or disbarring attorneys who failed to pay dues are in all respects similar to the arguments made by appellees here. See *In re Florida Bar,* 1952, 62 So. 2d 20, 23. Similarly, see *In re Mundy,* 1942, 202 La. 41, 11 So. 2d 398, where a lawyer refused to pay dues to an integrated bar on the ground that he had the constitutional right to belong or not belong to a bar association."

In the same brief at page 46, appellants cite and quote from Wicker, The Pros and Cons of an Integrated Bar, (Dec. 1954), 23 Tenn. Law Rev. 457, 459:

> "The must-be-a-member and the must-pay-dues provisions in the enabling acts of integrated bars have been passed on many times by the courts and every court that has considered them has held them valid." (Citing cases in footnote 4 on page 46 of the brief.)

Continuing the brief, at page 46, further states:

> "Although the integrated bar cases rely on the alleged distinction between special privilege callings and common callings, this issue is irrelevant once it has been accepted that even persons in a common calling can be required to belong to a union and pay dues and fees to it as a condition of continued employment. No one disputes that this Court in *Hanson* (351 U. S. 225) settled at least that issue."

Certainly if it is constitutional for a union under a Federal Act to impose and collect dues to be used for the purposes for which the "closed shop" was established, as ruled in the *Hanson* case, it must be equally constitutional in the entirety for the Integrated Bar to levy or impose on its membership a periodic license fee as a necessary and valid financial aid to it in the performance of the functions lawfully prescribed for it by the enabling authority, especially since these functions are always subject to the supervisory control of the Judiciary as well as the membership of the Integrated Bar by its voting power. This financial support does not impose any undue burden upon the membership, and while provision is made for the suspension of a member delinquent in payment of his periodic license fee this is also a necessary and proper requirement if the funds to be collected are to be paid when due.

The *Hanson* case ruled that the "closed shop" agreements made under the provisions of the Federal Act were not null and void, but valid in general on their face. Hence, even if certain expenditures by the unions should be held invalid, this alone would not invalidate the entire agreements. This same reasoning applies with all its force to the validity of the enabling provisions establishing the Integrated Bar, and in any event invalidating the use of these license fees on behalf of some activity objected to by a member, cannot operate to invalidate the whole of the provisions of law of a State and the rules and regulations of its Judiciary establishing the integration of the Bar. As pointed out in the brief of the United States in the *International Machinists* case, *supra*, at pages 40-41, after the decision of this Court in the *Hanson* case, it cannot be contested that the collection of dues and expenditures by the unions for the purposes related to collective bargaining violate any constitutional rights of those required to pay the dues in order to work. And insofar as the claim that the expenditure of certain funds "lead to invalidation of the whole structure of union shop collective bargaining would be to place the rights of the individual appellees—unnecessarily and without adequate reason on this record—above the interests of the majority of the members of the appellant unions." In that brief at p. 41, it is further stated: "The Railway Labor Act itself contemplates [a] system of industrial self-government." Continuing at page 43, it also states: ". . . the courts can provide full protection to the asserted constitutional rights of appellees without interfering or infringing upon the legitimate interests of the majority of the members of appellant unions." Without doubt these forceful arguments compel the conclusion that they must be applied here with equal force and effect to the contentions made against the constitu-

tionality of the integration of a Bar of a State and the collection and use of any license fees collected periodically for the support of the organization within the limits of activity prescribed by the enabling Acts of the State and by Judicial Rule.

In the instant case, the Wisconsin Supreme Court indicated that it would prevent abuse in the administration of the Integrated Bar system by limiting the activities and expenditures of the Integrated Bar, rather than declaring it invalid, 10 Wis. 2d 230, 102 N. W. 2d 404, 412, stating: ". . . any usurpation on the part of the State Bar of the powers of the legislature or the courts will not occur so long as this court sits. Without such usurpation of legislative or judicial power there can be no fascist syndicalism" which the appellant contends will be the end result under the Integrated Bar.

The provisions for the imposition of a license fee to be paid periodically, failure of which subjects the member to suspension from the practice of law, are necessary and reasonable, and, therefore, valid in all respects, at least as to these States, as will be seen by an examination of the statutory provisions and rules of the Judiciary.

Arizona, §32-216, Rev. Stat. Ann., as amended, provides that the annual license fee be not less than $10.00, subject to increase with consent of its Supreme Court. Rule (D) 2, of the Supreme Court, provides that after suspension for nonpayment of fees that the Board may require payment in double the amount of the fees due and shall make recommendation to the court for reinstatement.

Idaho, §3-409, Idaho Code, as amended, provides for an annual fee of $25.00, all moneys payable to the State Treasurer to be kept as a separate fund for

the use of the State Bar. Sec. 3-411 states that the funds received shall be used for "the purpose of carrying out the objects of this chapter, and in the exercise of the powers therein granted and duties hereby imposed."

Oregon, §9.190, Ore. Rev. Stat., the annual fee is $30.00. Reinstatement after suspension for delinquency requires all fees to be paid. §9.200.

Utah, §78-51-21, Utah Code Ann, 1953, as amended, the annual fee is $25.00 and all funds collected shall be deposited with the State Treasurer to be kept as a separate fund for the use of the State Bar in "carrying out the objects of this title." Reinstatement of members delinquent in payment of fees is obtained by application to the State Bar and payment of fees due plus $10.00. Rule VIII, Revised Rules of State Bar approved by Supreme Court.

Wyoming, Rule 5, Supreme Court, page 24, Vol. 2, Wyo. Stat. 1957, the annual fee being $20.00, all moneys collected to be paid to and disbursed by the Board, and delinquent member is reinstated upon good cause shown by payment of fees due, unless upon hearing the member is unable to pay the fee, then it may be remitted or suspended by order of court.

The fact that the funds are to be used exclusively for carrying out the purposes and functions defined by law precludes any chance of usurpation of constitutional rights of the membership, and the Judiciary of each of these States at all times acts in a supervisory capacity over the activities of these State Bars.

While appellant, at pages 71-75 of his brief, contends that the instant case is one involving "forced affirmation

of beliefs or opinions," there is not the slightest compulsion upon him to speak or to refrain from speaking on any issue. The only compulsion upon appellant is that he must belong to the State Bar in order to practice law. The State Bar, in turn, may take public stands on matters within its professional province as prescribed by law, subject always to the supervision of the Judiciary of the State. Therefore, to equate such public expressions of opinion by the State Bar, of which an individual is a member, with the individual affirmation compelled by the flag salute law in *West Virgina State Board of Education* v. *Barnette,* 319 U. S. 624, is to obscure very real differences of controlling constitutional significance.

The requirement that full report shall be made periodically to the membership in regard to the activities of the State Bar, and the expenditures in connection with the carrying out of the purposes and functions prescribed by law, alone affords ample supervisory control over the State Bar by its membership as well as the Judiciary. Moreover, no member is without appropriate remedy to make objections to the activities or use of funds of these integrated State Bars. He has the right and privilege to object to the activities and the expenditure of funds, deemed used without authority or for the purposes to which he objects, at their annual meetings, special meetings, and by suit in appropriate courts contesting any specific activity or the use of these funds for specific activities claimed to be illegal or to be an infringement of his constitutional rights. In any such instance the court would not be required to inquire into the power of a State to integrate its Bar, since that is strictly a matter of State policy and the exercise of the inherent power of its Judiciary, into which the court cannot examine since the authority of both is exclusive to the State and its Judiciary. The court is

limited in its review to the provisions of the enabling law and the Rules and Regulations of the Judiciary to determine whether they are reasonable and necessary to carry out the purposes intended thereby.

CONCLUSION

For the foregoing reasons, at least as to these States, it is believed that there is ample power in a State and its Judiciary to integrate its Bar. Further, that the imposition of a periodic license fee from the membership in order to carry out the purposes and functions prescribed by law to protect and promote the interests of the public, the State, the Judiciary in the administration of the law, and the science of jurisprudence and related subjects—is a necessary and proper obligation validly imposed on the membership of the Bar, subject always as it is to the plenary supervision of the Judiciary of the State and the entire membership of its Bar.

Respectfully submitted,

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DECEMBER, 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

BRIEF OF AMERICAN JUDICATURE SOCIETY AS AMICUS CURIAE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 200.

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

BRIEF OF AMERICAN JUDICATURE SOCIETY AS AMICUS CURIAE.

In his jurisdictional statement the appellant has undertaken to summarize briefly the history and nature of the integrated bar movement in this country, giving prominent mention to the part played by the American Judicature Society and its founder, the late Herbert Harley. Believing that a more complete and adequate telling of this story and of the Society's role in it would be of assistance to this Court in relating bar integration to other specific judicial reform measures and to the broad program for improving the administration of justice in general, the Society's executive committee has directed that this brief be filed for that purpose.

THE AMERICAN JUDICATURE SOCIETY.

As stated by the appellant, the American Judicature Society was founded in 1913 by Herbert Harley, a lawyer-newspaperman of Manistee, Michigan.

"Organization was prompted," said Mr. Harley, "in

> considerable measure by the agitation concerning judicial administration expressed in the movement for recall of judges and other restrictive proposals during previous years."[1]

The Society was conceived as a means of coordinating the reform element of the bench and bar.[2] Bar associations existed in most of the states and the American Bar Association was then 35 years old, but the American legal profession was only slowly finding itself again after a post-Civil War era of decadence characterized by a breakdown of organization, education and professional training which had resulted in a substantial deprofessionalization of the practice of law.[3] The legal profession in the first decade of this century, as described by John H. Wigmore, was—

> "a complacent, self-satisfied, genial fellowship of individual lawyers—unalive to the shortcomings of our justice, unthinking of the urgent demands of the impending future, unconscious of their potential opportunities, unaware of their collective duty and destiny."[4]

There was then no state in which more than one third of the practicing lawyers were enrolled as members of the state bar association.[5]

Herbert Harley spent four or five months of the year

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1. "Purposes and Methods of the Judicature Society," 21 J. Am. Jud. Soc. 67 (Oct., 1937).

2. Harley, "Concerning the American Judicature Society," 20 J. Am. Jud. Soc. 9, 10 (June, 1936); Winters, "Herbert Harley and the American Judicature Society," 78-104 (Oct., 1946); Winters, "The American Judicature Society and Its Work," Student Lawyer Journal, May, 1957, pp. 11-14, 28.

3. Pound, *The Lawyer from Antiquity to Modern Times*, 1953, Ch. VIII, pp. 221-241.

4. Wigmore, "Roscoe Pound's St. Paul Address of 1906—The Spark that Kindled the White Flame of Progress," 20 J. Am. Jud. Soc. 177 (Feb., 1937).

5. Harley, 10 J. Am. Jud. Soc. 23 (June, 1926).

1912 touring the entire country interviewing such reform-minded lawyers and judges as he could find and gathering ideas on how support for a judicial reform movement might be mobilized. The consensus was that it could not be done through any of the existing professional organizations and that a new organization would have to be created. Upon his return, he drew up plans for a new national organization to promote the efficient administration of justice. The American Judicature Society was incorporated in Illinois on July 15, 1913, with Roscoe Pound, dean of the Harvard Law School, John H. Wigmore, dean of Northwestern University Law School, Woodbridge N. Ferris, later United States senator and governor of Michigan, John B. Winslow, chief justice of the Supreme Court of Wisconsin, Harry Olson, chief justice of the Municipal Court of Chicago, and other outstanding leaders of bench and bar as its incorporators.[6]

Mr. Harley's preliminary outline of the field in which the new organization was to operate was as follows:

> "1. The judges—their manner of selection, compensation, tenure, administrative and judicial powers.
> "2. The bar—its requirements for admission, ethics, and scope of advocacy.
> "3. The organization of courts.
> "4. Procedure, comprising pleadings and practice."[7]

From the outset it was a main line of policy that the Society would work chiefly in and through the organized bar for the achievement of specific judicial reform projects. This was for the sound and sensible reason that people

6. Harley, *supra*, note 2, at pp. 11-12; "Our Fortieth Anniversary," 37 J. Am. Jud. Soc. 5-9, 7 (June, 1953).

7. From a "Circular Letter Concerning the Administration of Justice" mailed to 254 leading lawyers and judges in 29 states as a follow-up to his trip. Winters, "Herbert Harley and the American Judicature Society," 30 J. Am. Jud. Soc. 78, 80 (Oct., 1946).

everywhere tend to be suspicious of outsiders coming in and telling them what to do. The burden of lobbying and campaigning must always be carried by local residents of the state or community. Mr. Harley likened the American Judicature Society's function to that of the chemical catalyst, which encourages, promotes and makes possible a reaction among other substances without itself entering into it or being changed by it.[8]

This meant that the correction of the weaknesses and deficiencies of the bar would necessarily be a prerequisite to any substantial accomplishment in judicial selection, court organization, procedure, or other reform areas.

THE BEGINNING OF THE INTEGRATION CAMPAIGN.

It was with those thoughts in mind that Mr. Harley made a trip to Toronto, Ontario, at the invitation of Chief Justice William Renwick Riddell, to observe the operation of the Canadian bench and bar. He was well impressed with what he saw there, and especially with the organization of the bar, which was unified under the Law Society of Upper Canada on a pattern derived from the English Inns of Court.[9] He came home convinced that a similarly unified, or integrated, bar organization was what was needed in the United States for the achievement of the entire judicial reform program, and he proposed it in addresses delivered in 1914 before the Illinois State Bar Association and the Lancaster County Bar Association of Lincoln, Nebraska.[10]

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8. Harley, *supra*, note 2, at pp. 17-18.

9. The English and Canadian background of the integrated bar is completely set forth in pages 24 through 29 of the Brief for the Appellee in the instant case. See also, Pound, *op. cit.*, note 3, *supra*, Chapters IV and V, pp. 75-128; Holdsworth, *History of English Law*, 3rd Ed., 1923, Vol. 2, pp. 484-512.

10. Harley, "A Lawyer's Trust," 7 Neb. S. B. A. Proc. 143 (1913); 29 J. Am. Jud. Soc. 50-57 (Aug., 1945).

In 1921, seven years after the Illinois and Nebraska speeches, the first integrated bar came into existence in this country, in the state of North Dakota. During the interval the Society had published a series of bulletins containing drafts of proposals for selection and tenure of judges, organization of courts, rules of civil procedure, and small claims courts.[11] In 1917 the publication of the bimonthly *Journal* was begun, and in the December, 1918, issue appeared the text of a proposed state bar act.[12] Like most of the previous drafts, it was the work of Professor Albert M. Kales of Northwestern University.

AMERICAN BAR ASSOCIATION PARTICIPATION.

In 1916 Elihu Root, president of the American Bar Association, called a great national conference of state and local bar association officers to discuss various aspects of bar organization and activities. Similar conferences were held in subsequent years and assumed a continuity under the title "Conference of Bar Association Delegates." More or less autonomous at first, it early acquired status as a section of the American Bar Association, acquired more and more influence, and ultimately became the governing body of the American Bar Association as its House of Delegates in the reorganization of 1936.[13]

The Conference of Bar Association Delegates established in 1919 a Committee on State Bar Organization headed by Judge Clarence N. Goodwin of Chicago, which throughout the entire history of the Conference carried on a continuous and aggressive campaign for adoption of the integrated

11. Dates and titles of all bulletins are set forth in Winters, *op. cit.*, note 7, p. 88.

12. "Redeeming a Profession," 2 J. Am. Jud. Soc. 105-124 (Dec., 1918).

13. Sunderland, *History of the American Bar Association*, 1953, pp. 87-91; and see 46 A.B.A. Rep. 571 (1921) and other citations in Sunderland, Note 55, p. 91.

bar in the states. During the decade of the 1920's the Conference was at least as active a proponent of bar integration as was the American Judicature Society, Herbert Harley serving during most of that time as secretary of both organizations. As an appendix to its first report, delivered at the 1920 A. B. A. convention in St. Louis, the committee presented a second model state bar act, somewhat shorter than the American Judicature Society's draft published two years before.[14]

THE ESSENCE OF THE INTEGRATED BAR.

The integrated bar, as then conceived and as it exists today in a majority of the states, is simply a self-governing organization of the entire bar of a state, established by statute or rule of court. In its 1920 report the A. B. A. Conference committee was at pains to draw the clear distinction, still not grasped by many opponents of integration, between compelling a man to join an association and providing the machinery of organization for a group of which he is already a member.

> "The act should not be an attempt to transform a voluntary organization into a body politic," the report said, "but it should, rather, be a legislative recognition of the fact that the entire *existing* bar of the state, being in its nature a body composed of public officials constituting an integral part of the judicial department, is *inherently* a body politic, and the act should so *declare* it to be. It should provide a governing body selected by the entire bar, which should have powers of discipline and admission subject to review and final control * * * by the supreme court of the state."[15]

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14. The committee report is in 4 J. Am. Jud. Soc. 83-88 (Oct., 1920), and the model act in 4 J. Am. Jud. Soc. 111-114 (Dec., 1920).

15. 4 J. Am. Jud. Soc. 83, 86. (Italics added.)

NORTH DAKOTA THE FIRST.

The first integrated bar in this country, in North Dakota, did not follow either of the model acts. The 1919 session of that state's legislature had passed an act assessing every lawyer $15 a year to defray the expenses of the Board of Bar Examiners.[16] In the next session the bar was able to get enacted a relatively brief act establishing an organization of which all licensed lawyers were declared to be members, and empowering it to "adopt such constitution, by-laws and rules for its government as may be determined at its regular meetings" and allocating $3 of the $15 a year per member for its operation.[17] A constitution and by-laws were adopted on July 7, 1921, and the organization then set up is still functioning today.[18]

Meanwhile the Conference of Bar Association Delegates was promoting its model act, and bills based on it were introduced in a number of state legislatures in 1923, those of Alabama and Idaho being enacted into law that year. The Alabama legislature then had "split sessions" with an interval between introduction and passage of bills.[19] In the first part of the session opposition developed in the House judiciary committee. During the interval the sponsors prepared and published a pamphlet listing the objections that had been raised and answering them.[20] Some amendments also were drafted to clarify language that

16. Laws, 1919, ch. 69.

17. Laws, 1921, ch. 25; 5 J. Am. Jud. Soc. 15, 16 (June, 1921).

18. The bar act was amended in 1923, ch. 133, and the constitution in 1952. Brand, *Bar Associations, Attorneys and Judges-Organization, Ethics, Discipline*, 1956, pp. 471-474.

19. "Self Government Conferred upon Alabama Bar." 7 J. Am. Jud. Soc. 86 (Oct., 1923).

20. Its full text is reprinted in the above article, Note 19.

had aroused fears. The result was that in the second half of the session the measure was enacted into law.

Unfortunately, the Idaho statute was so worded that some lawyers thought its effect was to create a corporation by special legislation, in violation of a constitutional prohibition. For this and other reasons the act was first held unconstitutional; then after appropriate amendments were added in the 1925 legislature it was sustained.[21]

In 1925 also a bar act was passed by the New Mexico legislature, and the 1925 report of the Conference of Bar Association Delegates was able to report legislation introduced or drafted for introduction in 11 states, in addition to the four in which it had already been enacted into law.[22]

THE 1926 WASHINGTON CONFERENCE ON BAR ORGANIZATION.

At this time Charles Evans Hughes, then president of the American Bar Association and subsequently chief justice of this Court, accepted the chairmanship of the Conference of Bar Association Delegates for the following year, 1925-1926, and announced a national conference on state bar organization, to be held under the auspices of the Conference of Bar Association Delegates in Washington,

21. *Jackson v. Callet*, 39 Ida. 382, 228 P. 1068 (1923); *In re Edwards*, 45 Ida. 676, 266 P. 665 (1928). The *Edwards* case was not only responsive to the amendments that had been made, but also reflected a changed attitude on the part of some of the judges of the court. See Hawley, "Renaissance of the Bar," 13 Ore. L. Rev. 18-30 (Dec., 1933); Hawley, "Bar Integration in Idaho," 14 J. Am. Jud. Soc. 141-148 (Feb., 1931). "Idaho Bar Organization Completed," 9 J. Am. Jud. Soc. 37-46 (Aug., 1925) contains history of the movement in Idaho, rules for conduct and discipline of attorneys, text of by-laws and text of revised act.

22. California, New York, Oklahoma, Arizona, Missouri, Florida, Minnesota, Iowa, Michigan, Virginia and Tennessee. 9 J. Am. Jud. Soc. 106, 108-109 (Dec., 1925).

D. C., on April 28, 1926, immediately preceding the annual meeting of the American Law Institute.[23]

The conference was attended by delegates from 40 states in which bar integration was either adopted, pending or under discussion, and also by members of the General Council and the Executive Committee of the American Bar Association. In his opening remarks as chairman, Mr. Hughes said that the project was motivated by "a keen sense of the solidarity of the profession of the law, an appreciation of its standards and ideals, and an earnest desire to promote the administration of justice."

> "Let us also remember," he said, "that there are many states which apparently are ready for a movement of this sort, where it is needed, where those apprehensions are not indulged, where the organization of the bar might have a wholesome effect in producing a better conception of the duties and responsibilities of the profession."[24]

Delegates from Alabama, North Dakota and New Mexico reported at length on the success of integration in their respective states; other delegates discussed the progress of their integration campaigns and compared notes on methods and procedures; and considerable time was given to hearing objections from opposition-minded delegates. The meeting ended with adoption of a resolution sponsored by one of the opposition, but agreed to by all delegates, that the desirability of integration was a matter for the determination of each state in the light of its own conditions and traditions.

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23. "National Meeting on State Bar Organization," 9 J. Am. Jud. Soc. 106-110 (Dec., 1925).

24. Harley, "Special Meeting on Bar Organization Held at Washington," 12 A.B.A.J. 323-331 (May, 1926); parallel account, 10 J. Am. Jud. Soc. 11-22 (June, 1926).

INTEGRATION IN CALIFORNIA.

Within months after the Washington conference bar integration came to the first large state—California—as the culmination of a five-year effort. Among the prominent California bar leaders who had a part in it, Joseph J. Webb of San Francisco was outstanding. Mr. Webb devoted 133 days of his time in one year to addressing local bar groups from one end of the state to the other in behalf of the proposal. The result was that the measure went to the legislature with strong support and backing from a well-informed bar, as well as from the public.

The bill introduced in 1925 passed the legislature but was vetoed by the governor. That governor was defeated for reelection in the 1926 legislature, and when the measure was introduced again in 1927 it passed and was signed into law.

Upon organization and establishment of the State Bar of California the same year, and with North Dakota and Alabama already integrated, it was possible to say that in less than a decade integration of the bar had spread from the Atlantic to the Pacific coast and from the Canadian to the Mexican border.

A number of constitutional issues involving the integrated bar were raised for the first time in a series of actions filed in the California courts during the first few years of existence of the State Bar of California. They resulted in a series of favorable decisions which have been very frequently cited in subsequent litigation involving the bars of other states.[25]

25. "California Bar Wins Notable Success in Legislature but Falls Victim to Governor's Veto," 9 J. Am. Jud. Soc. 5 (June, 1925); "California Bar Act Finally Adopted," 10 J. Am. Jud. Soc. 173 (April, 1927); *State Bar* v. *Superior Court*, 207 Cal. 323, 278 P. 432 (1929) (not unconstitutional as creating private corporation by special act); *In re Shattuck*, 208 Cal. 6, 279 P. 998 (1929) (not unconstitutional delegation of judicial powers); *In re Peterson*, 208 Cal. 42, 280 P. 124 (1929).

INTEGRATION BY RULE OF COURT.

Nevada and Oklahoma were the sixth and seventh states to integrate, in 1928 and 1929 respectively. In the early years of Oklahoma statehood bar admission standards had been low and the supreme court roll was loaded with names of persons who did not in fact practice law.[26] Opposition from some of these made itself felt after integration when the new organization undertook to elevate professional standards, and for 10 years bills to repeal the bar act were introduced in every legislative session. In 1939 a repeal bill was passed. The Supreme Court of Oklahoma, on petition of the bar association and individual attorneys, thereupon reestablished the integrated bar on the basis of court rule rather than legislative enactment, and that organization is still functioning today.[27]

In taking that action, the Supreme Court of Oklahoma set a pattern for bar integration that was destined to supplant the statutory method that had prevailed up to that time. It had long been settled law, of course, in all jurisdictions, that attorneys are officers of the courts and an integral part of judicial establishment. This relationship had been the basis for countless holdings that examination and admission of attorneys, and their discipline and disbarment, are matters for control by court rule.[28]

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26. It is said that there were 20,000 in all on the roll at the time of integration. On the other hand, many lawyers who had been practicing before statehood never bothered to go and register. 13 J. Am. Jud. Soc. 84 (Oct., 1934).

27. *In re Integration of State Bar of Oklahoma*, 185 Okla. 505, 95 P. 2d 113 (1939).

28. *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366 (U. S., 1867); *State* v. *Cannon*, 196 Wis. 531, 221 N. W. 603 (1928); *Com. ex rel. Ward* v. *Harrington*, 266 Ky. 41, 98 S. W. 2d. 53 (1936); *In re Richards*, 333 Mo. 907, 63 S. W. 2d. 672 (1933).

In Illinois this had been held to be an exclusively judicial power, not subject to legislative control.[29] Robert Guinther, president of the Ohio State Bar Association, in 1933 had specifically urged integration by rule of court rather than by legislative enactment.[30]

In 1931 a bar bill similar to California's was enacted in Utah[31] and one was introduced in South Dakota, but it was defeated after encountering strenuous opposition in the legislature. In the debate, the opponents spoke favorably of the short-form bill enacted years before in North Dakota. Thereupon, in the closing hours of the session, a substitute bill was introduced and passed, establishing a public association to be known as the State Bar of South Dakota, directing the Supreme Court of South Dakota to call the first annual meeting of the new organization, and giving the Supreme Court "power to do such acts and things as may be necessary to accomplish the organization of the State Bar."[32]

A meeting was held in Rapid City in August of that year, and by-laws were drawn up which were subsequently approved by the court.

MORE CAMPAIGNS IN 1933.

The year 1933 saw eleven legislative campaigns for bar integration, with bills introduced in the legislatures of Arizona, Indiana, Kansas, Michigan, Missouri, Montana,

29. *In re Day*, 181 Ill. 73, 54 N. E. 646 (1899).

30. Guinther, "Supreme Court Can Organize Bar," 17 J. Am. Jud. Soc. 39 (Aug., 1933).

31. Laws 1931, Ch. 48, §§ 1-25, now Utah Code Ann. 1953, Vol. 9, Title 78, Part 6, Ch. 51, §§ 1-44, pp. 404-451, and 1959 Cum. Pocket Supp., pp. 48-49.

32. Laws 1931, Ch. 84; S. D. Code 1939, 1960 Supp., Vol. 2, Title 32, §§ 32.1101-32.1124, pp. 51-55; 76 S. D. ix-xiii. "Utah and South Dakota Bar Bills Enacted," 14 J. Am. Jud. Soc. 188 (April, 1931). "State Bar Organized in South Dakota," 15 J. Am. Jud. Soc. 70-71 (Oct., 1931).

North Carolina, Oregon, Texas, Washington and Wyoming. Three of these became law—Arizona, which was after the California pattern, Washington, on the short form, and North Carolina.

The North Carolina act was notable because it did not contemplate the discontinuance of the North Carolina Bar Association. The North Carolina integrated bar is managed by a council composed of representatives from each of 20 superior court districts, chosen by the lawyers in those districts. For more than a quarter of a century the North Carolina State Bar and the North Carolina Bar Association have existed side by side, a continuing refutation of the argument that integration of the bar compels a lawyer to join his state bar association whether he wants to or not. Membership in the North Carolina Bar Association is voluntary as it always was, and no lawyer is or can be compelled to join it. Neither is anyone compelled to join the North Carolina State Bar—a voluntary decision to become a North Carolina lawyer is simultaneously a voluntary decision to become a member of that state's bar. In practice the work of the integrated bar is limited to admissions and discipline, while social, educational, public relations and other activities are carried on by the North Carolina Bar Association.[33]

LOUISIANA.

The Louisiana bar, like the Oklahoma bar, was first integrated by statute and then later on by rule of court after repeal of the statute.

The integration statute was passed in 1934. It followed

33. "Washington, Arizona, North Carolina Bar Bills Enacted," 16 J. Am. Jud. Soc. 172-3 (April, 1933); *Baker* v. *Varger et al.*, 240 N. C. 260, 82 S. E. 2d. 90 (1954); Winslow, "Voluntary Bar in North Carolina," 6 Duke Bar Ass'n. J. 19-29 (Winter, 1937); Bryson, "Organized Bar in North Carolina," 30 N. C. L. Rev. 335-355 (June, 1952).

the model act in most respects, but there was one important difference which was the reason for its subsequent repeal. The bar was to be governed by a board consisting of one member from each of eight Congressional districts, to be elected by popular vote in general elections along with other public officials.

The effect of such a provision was to open the door to possible political control of the bar. It was criticized by bar leaders both in Louisiana and elsewhere, and in 1940 the objectionable feature was removed. By that time, however, integration by rule of court had gained general recognition and acceptance, and so instead of merely amending the statute the legislature repealed it and memorialized the supreme court to integrate the bar under its inherent power.

In 1942 the new integrated bar of Louisiana was sustained by the Supreme Court of Louisiana against an attack on constitutional grounds including freedom of association and due process of law.[34]

FOURTEEN INTEGRATION BILLS IN 1935.

The year 1935 was the high water mark in bar integration campaigns, with no less than 14 bar bills introduced for legislative action.[35] Only two were enacted, an act providing a statutory organization for the Oregon bar, and a short act authorizing the Supreme Court of Michigan to integrate the Michigan bar. This was noteworthy

34. "Statutory Organization for Louisiana Bar," 18 J. Am. Jud. Soc. 110 (Dec., 1934); *In re Mundy*, 202 La. 41, 11 So. 2d. 398 (1942); "Bar Integration—Compulsory Membership and Payment of Dues," 17 Tulane L. Rev. 493 (Feb., 1943).

35. Arkansas, Colorado, Georgia, Indiana, Michigan, Kansas, Minnesota, Nebraska, Oregon, South Caroline, Tennessee, Texas, Wisconsin and Wyoming. "Oregon Joins Integration Column," 18 J. Am. Jud. Soc. 170 (April, 1935).

because it brought the second major metropolitan center within the integration orbit. Los Angeles had been under integration since 1927; Detroit in 1935 was the fourth largest city in the United States.[36]

The Michigan act was similar to one passed in Kentucky the year before, establishing the state bar as an organization and empowering the supreme court to complete the job. Each court did so, but each court subsequently repudiated the apparent delegation of legislative power and declared that the action was under the court's own inherent power over the lawyers as officers of the court.[37]

INTEGRATION BY PETITION TO COURT.

The Michigan and Kentucky courts by their assertion of inherent power paved the way for the first instance of court rule alone as a method of integration. Following Herbert Harley's 1914 speech in Lincoln, the Nebraska State Bar Association had been the very first to endorse integration and adopt it as an association objective.[38] The Association had gone in vain to the legislature a number of times. In 1937 it went direct to the Supreme Court of Nebraska with a petition to the court to integrate un-

36. "Michigan Bar Integration Bill Adopted," 19 J. Am. Jud. Soc. 21 (June, 1935); Brand, "Bar Integration in the State of Michigan," 14 Indiana L. J. 235-244 (Feb., 1939); Blashfield, "Is Bar Integration Worth the Candle?" 28 Wis. Bar Bull. 8-10, 64-68 (Oct., 1955); Bonisteel, "Twenty-Five Years of Progress," 39 Mich. State Bar J. 20-23 (Nov., 1960).

37. *Ayres* v. *Hadaway*, 303 Mich. 589, 6 N. W. 2d. 905 (1942); statement of Mr. Justice North, 25 J. Am. Jud. Soc. 93 (Oct., 1941); *Com. ex rel. Ward* v. *Harrington*, 266 Ky. 41, 98 S. W. 2d. 63 (1936); *In re Sparks*, 267 Ky. 93, 101 S. W. 2d. 194 (1937); *Kenton C. Bar Ass'n.* v. *Murphy*, 272 Ky. 617, 114 S. W. 2d. 722, cert. denied, 305 U. S. 671, 59 S. Ct. 142 (1938).

38. "Bar Integration Wins," 3 J. Am. Jud. Soc. 148 (Feb., 1920). Judge Clarence N. Goodwin, chairman of the Conference of Bar Association Delegates Committee on Bar Organization, addressed the Nebraska State Bar Association at that Meeting.

der its inherent power, and the petition was accompanied by a set of proposed rules. The court granted the petition and approved the rules. The opinion by Mr. Justice Carter is an able, authoritative and scholarly dissertation on the nature and extent of the court's power and the bar's relation to it.[39]

It was against this background, along with Kentucky and Michigan, that the Louisiana legislature in 1940 memorialized its supreme court to act under its own inherent powers rather than by delegation of legislative power.[40]

Bar integration came to Missouri in part in 1934 and in full in 1944, both by supreme court rule. Efforts for integration by legislation went as far back as 1923, and after an unsuccessful attempt in 1933 the Supreme Court of Missouri, on petition of the Missouri State Bar Association, established the Missouri Bar Administration as a vehicle for the exercise of its inherent powers over bar admission, bar discipline and unauthorized practice. From then until 1944 Missouri was spoken of as a partially integrated state.[41] In 1943 resolutions in favor of full integration were passed by the state bar association and the two local associations in each of the two major cities, as well as other local associations elsewhere in the state. A supreme court committee was appointed in December, 1943, to draft a plan of integration, copies of which were mailed to all Missouri lawyers with ballots, which came back six to one in favor of the plan. The court's order

39. *In re Integration of Nebraska State Bar Assn*, 133 Neb. 283, 273 N. W. 263, 114 A. L. R. 151 (1937); Boslaugh, "Integrated Bar of Nebraska", 13 Mo. Bar. J. 187-192 (Oct., 1942).

40. *Supra*, note 34.

41. Charles A. Beardsley, president of the American Bar Association in 1939, called it the "Missouri compromise".

integrating the bar was entered on June 16, 1944, and the new organization began to function on September 30.[42]

OTHER COURTS ACT ON PETITION.

Other bars since integrated by rule of court on petition include Florida in 1949, and Wisconsin and the Virgin Islands in 1956, the latter being the only instance of integration by action of a federal court.[43]

In the 1920's the Florida bar was demoralized, overrun with immigrant attorneys from other jurisdictions unchecked by adequate admission standards. The state bar association boasted only a handful of members. Devoted and sacrificial labor by a series of great bar leaders brought a steady improvement which in the mid-1930's moved toward closer coordination with the supreme court. In 1936 the bar association's committee on integration submitted by petition a plan similar to that then in operation in Missouri. The court first denied the petition, then on rehearing granted most of it but not the vital item of an annual fee of $3 from each practitioner.[44]

In 1941 a bill for an enabling act passed one house but was defeated in the other after two days of stormy debate.[45] In 1946 the Association directed its board to try again with a petition to the court with draft rules attached.

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42. *In re Richards*, 333 Mo. 907, 63 S. W. 2d 672 (1933); *Clark* v. *Austin*, 340 Mo. 467, 101 S. W. 2d 977 (1937); Hemker, "Integrated Bar Created by Missouri Supreme Court," 28 J. Am. Jud. Soc. 50 (Aug., 1944).

43. *In the matter of the Integration of the Virgin Islands Bar*, Misc. No. 11—1955, reprinted in V. I. Code Ann., Vol. 2, Title 5, Appendix 6, Part 3, pp. 352-359 and Cum. Pocket Supp. 1960, pp. 17-18. *Virgin Islands Bar Ass'n* v. *Dench*, 2 V. I. 331, 124 F. Supp. 257 (1953); app. 3 V. I. 521, 215 F. 2d 810 (1954).

44. *Petition of Florida State Bar Ass'n*, 134 Fla. 851, 186 So. 280 (1938).

45. 25 J. Am. Jud. Soc. 45 (Aug., 1941).

A poll of the bar the following year came out 1,131 to 500 for the rules. The petition was granted early in 1949.[46]

Presumably other documents to be filed in the instant case will inform the Court fully as to Wisconsin bar organization, but a few words about the history of the movement in Wisconsin will be appropriate at this point.

Bar integration was first proposed in Wisconsin in 1914 by Claire B. Bird, then president of the Wisconsin Bar Association, but no action was taken until 1933 when, under the presidency of Carl B. Rix a committee on integration was appointed with Mr. Bird as chairman. The committee enlisted Dean Lloyd K. Garrison of the University of Wisconsin law school, who made an exhaustive study of the subject and drafted a bar bill that was introduced in the 1935 legislature. In a paper read before the state bar association in 1935, Dean Garrison listed the weaknesses of the unintegrated associations:

> "1. The limited number of members. 2. The limited financial resources resulting from small membership. 3. The waste of time and effort required to keep up a proper membership. 4. The difficulty in enforcing discipline without its own limits. 5. The inability to mobilize the bar as a whole in support of desirable movements. 6. The difficulty in coordinating its activities and those of the local associations. 7. The difficulty in assimilating new members of the profession. Another weakness of the voluntary association is that it is open to the generally unfair but frequently effective attack that it represents a clique."[47]

The bar bill was introduced in every legislative session from 1935 to 1943, and Wisconsin has the distinction, not likely to be duplicated, of being the only state in which a

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46. *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. Sup. Ct., 1949); "Florida Bar Is Integrated by Supreme Court Rule," 33 J. Am. Jud. Soc. 26-27 (June, 1949) (includes list of integrated states, year and method of integration).

47. Shea, "Wisconsin's Successful Bar Integration Campaign," 27 J. Am. Jud. Soc. 13, 14 (June, 1943).

bar integration bill was *twice* vetoed by an *acting* governor. When the 1943 legislature overrode the veto, Edmund B. Shea, then chairman of the integration committee, reasonably felt that the last hurdle had been surmounted, and he authored an article entitled "Wisconsin's Successful Bar Integration Campaign."[48]

He spoke too soon. The statute was only an enabling act, like Michigan's, leaving affirmative action to the supreme court, and the court decided not to act until the return of lawyers then in military service.[49] The Association tried again in 1946, and then the court in a surprising opinion found fault with the proposal from nearly every angle and in particular declared its unwillingness to undertake the burden of supervising the state bar.[50] The petition was denied, and that was all for eight years, during which interval the Wisconsin Bar Association rewrote its constitution to improve its representative character and general efficiency.[51]

In 1955 under the presidency of Alfred E. LaFrance the Wisconsin Bar Association announced a long-range four-point program, the first item of which was to be a renewed drive for integration of the bar; the second, acquisition of a suitable headquarters building in the city of Madison; the third, reorganization of the state's court system; and fourth, judicial selection reform.[52] A petition direct to the Supreme Court of Wisconsin asking it to proceed un-

48. Shea, "Wisconsin's Successful Bar Integration Campaign," 27 J. Am. Jud. Soc. 13-17 (June, 1943).

49. *Integration of the Bar Case*, 244 Wis. 8, 11 N. W. 2d 604; 151 A. L. R. 586 (1943).

50. *In re Integration of the Bar*, 249 Wis. 523, 25 N. W. 2d 500 (1946); "The Wisconsin Integration Opinion," 30 J. Am. Jud. Soc. 147-150 (Feb., 1947).

51. 21 Wis. Bar Bull. No. 3 (Supplement) (Aug., 1948).

52. La France, "President's Page," 28 Wis. Bar Bull. 5 (Aug., 1955).

der its inherent power was received with favor and granted in June, 1956.[53] Integration was for a two-year trial, subject to re-examination in 1958, but in 1958 the Court found the results excellent and ordered the integrated bar to be continued indefinitely.[54] It was shortly after the handing down of that decision that the instant action was commenced.[55]

VIRGINIA, WEST VIRGINIA AND TEXAS.

In March, 1938, after repeated introductions of a long bar bill, the Virginia legislature passed a short-form bar act under which the Supreme Court of Appeals proceeded to organize and set up an integrated bar.[56] The Virginia organization is similar to that of North Carolina (and indeed, the North Carolina act was patterned after an earlier Virginia draft) in that it is governed by a council, the members of which are elected at meetings in each judicial circuit called by the circuit judges.[57]

In 1945 the West Virginia legislature brought to a successful conclusion a 15-year campaign for integration of the bar of that state. It first began to be talked of in 1931, and it was on the state bar association's program after 1936, when a mail ballot showed the bar strongly in favor

53. *In the Matter of the Integration of the Bar*, 273 Wis. 281, 77 N. W. 2d 601 (1956).

54. *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N. W. 2d 601 (1958).

55. *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N. W. 2d 404 (1960).

56. Acts 1938, Ch. 410; 1950 Code, Vol. 7, 1958 Replacement, Title 54, Ch. 4, Arts. 1 and 2, §§ 54-48 to 54-42.1 and 1960 Cum. Pocket Supp. pp. 72-73.

57. "Virginia Bar Bill Enacted," 21 J. Am. Jud. Soc. 207 (April, 1938); Rules for Integration of the Virginia State Bar, IV Organization and Government, 5, The Council, Brand, *Bar Associations, Attorneys and Judges—Organization, Ethics, Discipline*, 1956, pp. 675-676.

of it. Bills in 1939 and 1941 failed to pass, and in 1943 it ran into a governor's veto. A petition to the Supreme Court of Appeals for integration by rule of court was denied, the court being understandably reluctant to veto the veto. In 1945, armed with another poll showing lawyers both at home and in war service overwhelmingly in favor, they pushed the bill through to the governor's signature. Interestingly, although the court had declined to integrate by petition alone, the statute expressly declares the inherent rule-making power of the Supreme Court of Appeals.[58]

In April, 1939, after five previous unsuccessful legislative campaigns, the Texas Bar Association obtained enactment of a short enabling act under which in succeeding months the Supreme Court of Texas integrated the State Bar of Texas. Features of the Texas act were its preservation of the right of trial by jury in disbarment cases, and a provision that proposed rules should be submitted by mail for a members' vote and any proposed rule supported by a petition signed by 10 per cent of the lawyers of the state should also be submitted, and those rules winning a majority vote (provided 51 per cent of the lawyers voted) would be the state bar rules.[59]

ARKANSAS.

The Bar Association of Arkansas began a campaign for bar integration in 1934. Following informal conferences with justices of the supreme court, a decision was made

58. "West Virginia State Bar Puts Integrated States in Majority," 28 J. Am. Jud. Soc. 165-169 (April, 1945). Acts 1945, Ch. 44. Code 1955, Ch. 51, § 5183, p. 2308. 128 W. Va. xvii-lxii (rules, constitution, by-laws).

59. "Texas Bar Wins Ten-Year Campaign," 23 J. Am. Jud. Soc. 41 (June, 1939). Acts 1939, 46 Leg. Ch. 1, p. 63, eff. April 19, 1939. Vernon's Texas Civil Stats. Ann., Vol. 1A, Title 14, Art. 320a-1, pp. 191-202, and Cum. Pocket Supp. 1960, p. 7. *Id.*, pp. 203-241 and 1960 Supp. pp. 7-8 (Rules).

to procure a constitutional amendment making judicial power clear. In 1938 the following amendment was adopted by a large majority:

> "The supreme court shall make rules regulating the practice of law and the professional conduct of attorneys at law."[60]

The following year the Supreme Court of Arkansas in compliance with the constitutional mandate established a state-wide organization for disciplinary purposes, managed by a board consisting of one lawyer from each of the seven Congressional districts, and financed by an annual fee of one dollar to be paid by all practitioners.[61] Ever since establishment of this system Arkansas has been listed among the integrated states, even though it is a limited integration applying to discipline only. Meanwhile, the state bar association has continued to function and to press for full integration. Full integration was a perennial item on the Association's program for many years, and in 1953 a petition was presented to the supreme court backed by 71 per cent of the bar and with only 6 per cent registering opposition. The court confirmed this with a poll of its own which drew a favorable vote of 592 to 455. It thereupon granted the petition and invited the sponsors to prepare proposed draft rules for adoption.

The date of that decision was April 12, and the bar association's annual meeting was scheduled to take place less than a month later. Except for that coincidence the plan would undoubtedly have gone through without incident and the integrated organization be in operation today. At the meeting, however, a group of lawyers from the Crittenden County Bar Association reopened the debate on the subject,

60. Const. 1874, Amendment 28.

61. See 207 Ark. xxxi-xxxvii for rules governing admission to the bar and rules regulating conduct of attorneys at law.

resulting in adoption of a resolution asking the court to rescind its April action. Another mail vote was taken and a whirlwind anti-integration campaign resulted this time in a vote of 1,003 to 485 against integration. The court granted a rehearing and denied the petition.[62]

That action, however, did not disturb the organization set up under the 1938 constitutional amendment, by virtue of which Arkansas is still listed as an integrated state in most enumerations.

ALASKA AND PUERTO RICO.

Among the most recent additions to the integrated list is Alaska, the bar of which was integrated by act of the Territorial legislature in 1955.[63] Prior to 1955 the Alaska bar was unorganized except for local associations in Anchorage, Fairbanks, Juneau and Ketchikan. A controlling factor in impelling Alaska lawyers to seek integration was the necessity of establishing more adequate control over discipline and admissions, particularly admissions by transfer, in view of the widespread interest in Alaska occasioned by the statehood boom. Rules covering bar admission, ethics and discipline were adopted by the new organization in June, 1955.[64]

Puerto Rico's bar was incorporated as a quasi-public institution in 1840, under the title of "Colegio de Abogados de Puerto Rico." With the coming of American rule in 1898 they abandoned it for a new voluntary "Asociacion

62. *In re Integrating the Bar*, 222 Ark. 35, 259 S. W. 2d. 144 (1953). "Arkansas Court Grants, then Denies, Integration Petition, at Bar's Request." 37 J. Am. Jud. Soc. 52-53 (Aug., 1953).

63. Laws 1955, Ch. 196. C. L. 1949, 1957 Cum. Supp., Vol. 1, Title 35, Ch. 2, §§ 35-2-77a to 35-2-77, pp. 534-541, as amended by laws 1960, Ch. 178, pp. 282, 284. *In re Paul*, 17 Alaska 360 (1957).

64. Brand, *Bar Associations, Attorneys and Judges—Organization, Ethics, Discipline*, 1959 Supp., pp. 10-18.

de Abogados de Puerto Rico" which lived a languid and precarious life, having lost its former official support and prestige. It was helpless to accomplish anything toward elevating professional standards or bettering the administration of justice. In 1932, after several tries, passage was procured of an act reestablishing the "Colegio" with annual dues up to $10 and with additional revenue from a fee of one dollar on each first pleading. The 800 lawyers on the island voted their approval in a referendum. The organization has since acquired a headquarters building, established group insurance and pension plan, and provided other services to the lawyers and the people of Puerto Rico.[65]

LOOKING AHEAD.

The ranks of the unintegrated states, already a minority, are due to shrink still further in years to come. Integration campaigns and studies are presently under way in six states—District of Columbia, Hawaii, Indiana, Kansas, New York and Tennessee.[66] Bar association committees have been appointed in all six states. The New York State Bar Association scheduled a debate on integration at its

65. Laws of Puerto Rico Annotated, Vol. 1, Title 4, Part 4, Ch. 63, §§ 771-785, pp. 872-880, and 1959 Supp. pp. 189-191. "Porto Rico Lawyers Secure Bar Act," 16 J. Am. Jud. Soc. 104-106 (Dec., 1932); "Porto Rico Bar Accepts New Act," 17 J. Am. Jud. Soc. 152 (Feb., 1934); "Puerto Rico's Integrated Bar Prospers," 22 J. Am. Jud. Soc. 85-86 (Aug., 1938); *Bar Ass'n. of Puerto Rico* v. *Fajardo et al.*, 51 P.R.R. 512 (1937); *In re Bosch*, 65 P.R.R. 232 (1945).

66. "Should There Be an Organized Bar in the District of Columbia?" J. Bar Ass'n D. C. 225-226 (May, 1960). Kidwell, President's Page, 1 Hawaii Bar J. 5-6 (Jan., 1959). Fox, "Proposed Indiana Self-Governing Bar Act," 38 Commercial Law J. 143-147 (March, 1933); "Special Committee to Study Integration of the Bar of Indiana Appointed by President," 4 Res Gestae (Ind. S.B.A.) 3 (Jan., 1960). Spies, "Integrated Bar—Pros and Cons—Feasibility in Kansas," 28 J. Bar Ass'n. State of Kansas 333 (Feb., 1960). Belknap, President's Page, 32 N.Y.S.B. Bull. 153-154 (June, 1960).

1960 midsummer meeting,[67] and arranged for a scholarly research study of bar integration in other states to be conducted by Columbia University's Bureau of Applied Social Research.[68]

Integration will yet come to others of the unintegrated states. The highest courts of Connecticut, Iowa, Massachusetts, Minnesota, Montana, New Jersey and Tennessee, while declining to grant integration petitions for various reasons have done so without prejudice and with affirmation of their power to integrate the bar and their willingness to do it under proper circumstances or upon proper presentation.[69] There is scarcely a state in which some systematic integration campaign has not been undertaken by the leaders of the organized bar some time or other during the past twenty years.[70]

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67. Coulter, "Integration Is the Answer," 32 N.Y.S.B. Bull. 305-309 (Oct., 1960); Edmonds, "Integration of the Bar—A Boon or a Bust?" 32 N.Y.S.B. Bull. 297-304 (Oct., 1960).

68. William A. Glaser, *The Debate Over the Integrated Bar; The Organization of the Integrated Bar; Bibliography on the Integrated Bar*. 30, 35 and 12 pages, respectively. New York, Columbia University, Bureau of Applied Social Research, 1960. Litho-printed.

69. "Proposal for Integrated Bar Rejected," 18 Conn. B. J. 3-8 (April, 1944); "Rules for the Integrated Bar," 20 Conn. B. J. 245-259 (July, 1946); Pryor, "Need for Bar Integration Is Imperative," 21 J. Am. Jud. Soc. 56 (Aug., 1937); "Action Delayed in Iowa," 22 J. Am. Jud. Soc. 207 (April, 1938); *In re Integrated Bar*, 321 Mass. 747, 74 N. E. 2d. 140 (1947); *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 12 N. W. 2d. 515 (1943); 27 J. Am. Jud. Soc. 147-148 (Feb., 1944); *In re Integration of the Bar of Minnesota*, 226 Minn. 578, 34 N. W. 2d. 157 (1948); *In re Unification of Montana Bar Ass'n.*, 107 Mont. 559, 87 P. 2d. 172 (1939); *In re Unification of the Bar of This Court*, 119 Mont. 494, 175 P. 2d. 773 (1947); "Bar Integration Movement Comes to Halt in New Jersey," 42 J. Am. Jud. Soc. 30 (June, 1958); *Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee*, 282 S. W. 2d. 782 (1955).

70. Not much interest has been shown in Maine, New Hampshire, Vermont and Delaware, which have small, cohesive bars with something that might be called *de facto* integration.

INTEGRATION AND LOCAL BAR ASSOCIATIONS.

At the 1926 National Conference on Bar Organization the bulk of the opposition that was voiced came from New York and Illinois delegates. The secretary's account of the meeting[71] suggests that at least with respect to New York this was due in part to apprehension that the identity of the local city associations would be merged and lost in the integrated state association. This was due largely to the Gibbs bill, introduced in the New York legislature in 1925, which provided for regional divisions of the integrated state association and provided that any existing local associations might, if they wished, elect to be the nucleus of such regional divisions. This was entirely optional with the existing associations, but it made members of the two large local associations in New York city and New York county wonder what integration might do in one way or another to the fine facilities which were then maintained, and still are, for the benefit of their members.

The answer is that state bar integration does not adversely affect the membership, finances or activities of a local bar association in any way. Indeed, one of the benefits from bar integration has been the boost it has given to local bar associations. Among the finest local bar associations in the country are the Los Angeles Bar Association, the Detroit Bar Association, the Bar Association of St. Louis, the Dallas Bar Association and others represented in the American Bar Association House of Delegates from states having an integrated bar. The Philadelphia Bar Association, the oldest bar association in the United States, has inquired seriously into the possibilities of establishing an integrated bar in that city on a local basis.[72]

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71. *Supra*, note 24.

72. "Philadelphia Bar Committee Studies City-Wide Integration," 36 J. Am. Jud. Soc. 154 (Feb., 1953).

THE INTEGRATION CAMPAIGN.

In commenting on defeat of an integration bill in the 1943 Colorado legislature, Edward L. Wood, then president of the Colorado State Bar Association, said:

> "Our failure is regrettable, but we came closer to success than ever before. May I say to you that I think the integration of the Colorado bar, with its many resulting benefits to the lawyer and the public, is absolutely inevitable. We do not want it, of course, unless a preponderating majority of the lawyers of Colorado want it. There was in this last campaign for integration still a substantial minority of lawyers who opposed it. I am convinced that this opposition exists because the plan is not thoroughly understood, and I am convinced that when the facts of integration actually reach every lawyer in the state, no less than 90 per cent of the entire bar will favor the plan. I think there can be no doubt now that if we lawyers want an integrated bar, the legislature and the supreme court will give it to us."[73]

Mr. Wood's analysis of the Colorado situation can be applied to most of the states where integration campaigns have fallen short of success. States do differ, but what is good for North Dakota just cannot be very bad for Montana, and what is good for North Carolina cannot be too bad for South Carolina. The difference will be found to lie not in the merits or demerits of the integrated bar, nor in the differing conditions of one state as against another, but mostly in the manner, circumstances and energy with which the proposal was presented. In some states there have been special elements of opposition such as a publishing firm which feared that the integrated bar might take over its business.

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73. Quoted in "Planning a Bar Integration Campaign," 27 J. Am. Jud. Soc. 149 (Feb., 1944).

ENDORSEMENTS.

The list of prominent proponents of bar integration throughout the past half-century constitutes an honor roll of the American bar. The leading part played by Elihu Root and Charles Evans Hughes already has been noted.[74] Arthur T. Vanderbilt, addressing the Conference of Bar Association Delegates in 1936, said:

> "All the counter-arguments fall to the ground and all the favorable arguments swing into line as mere supporting corollaries behind this fundamental and conclusive proposition: The organized bar has a pragmatic virtue. In short, it works. It succeeds where the voluntary state bar association has either failed utterly or at best has functioned only partially and spasmodically. Where the bar is unified, it has a standing with the bench, the chief executive, the legislature and the public generally that it has nowhere else attained."[75]

In 1945 the Honorable John J. Parker, late chief judge of the United States Court of Appeals for the Fourth Circuit, wrote to a Maryland correspondent:

> "I hasten to say that the integration of the bar, both in Virginia and North Carolina has been a great success and I do not think any thoughtful lawyer in either state would think for a moment of abandoning it. The benefits from a thing of this sort are, of course, of an intangible nature, but I have a very definite feeling that the atmosphere of the bar in both states has been greatly improved as a result of integration. I would not presume to speak of your local problems in Maryland, but I have no doubt that you would find integration beneficial there just as it has been found

74. *Supra*, notes 13, 23, 24. Goodwin, "Elihu Root and Charles Evans Hughes Were Early Leaders of the Movement for Integration of the Bar," 34 J. Am. Jud. Soc. 149-150 (Feb., 1951).

75. Vanderbilt, "Past, Present and Future of the Legal Profession," 20 J. Am. Jud. Soc. 208, 209 (Feb., 1937).

beneficial in other states. In the last several years I have been all over the United States a number of times, and wherever integration has been tried the members of the bar whose opinion is worth anything have unhesitatingly acclaimed it a success."[76]

Robert H. Jackson, writing in the American Bar Association Journal prior to his becoming an associate justice of this Court, said:

"A basic question that the American Bar Association must decide is which of the two schools of bar association activities it will follow. One school favors a voluntary club of selected members. Opposed to this is the all-inclusive association which is an organization of the whole bar as it is, good, bad and indifferent. While it may not be necessary to abandon our different lawyers' clubs, we need an organized profession, and while this includes some members whose fellowship and opinions we may not value, yet if they are worthy to be admitted as members of the profession, they must not be excluded from the organized bar."[77]

In his recent book *The Legal Profession from Antiquity to Modern Times*, Roscoe Pound declares that the integrated bar has a mission "of first importance," and he goes on to explain:

"By keeping the followers of the different specialties of practice, the different groups into which the lawyers of the large cities of today tend to regroup themselves, conscious of a higher organization of which they are members and to which, as the profession itself, they are responsible, it can stand fast against the disintegrating tendencies which, threatening professions, threaten ultimately the law."[78]

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76. Quoted in Webb, "Whole Bar Organization—A Necessity," 29 J. Am. Jud. Soc. 38, 47 (Aug., 1945).

77. Jackson, "An Organized American Bar," A.B.A.J. 386 (June, 1932).

78. Page 362.

CONCLUSION.

The purpose of these quotations, as of the rest of the contents of the foregoing pages, is not so much to sell the merits of the integrated bar as an institution as it is to make clear that the nationwide movement for integration of the bar is a part of the still broader movement for a better administration of justice which has been gathering steam each decade since the beginning of the century. Indeed, it is the part which is valuable chiefly for the sake of its contribution toward the achievement of the rest, and nowhere is this better demonstrated than in Wisconsin itself. Of the four major objectives laid out in 1955, three have already been attained. It is not a coincidence that integration was the first of the three; it helped to make possible the achievement of the others. As Thomas Coleman, of the West Virginia Bar Association, said:[79]

> "Integration is a goal to be striven for, rather than a status already achieved. It implies a bar united in purpose and spirit, as well as by the forms of law, with a vision of the larger benefits that will come to it and to the public generally when its entire moral and intellectual resources are mobilized and directed to the accomplishment of its ideals."

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79 28 J. Am. Jud. Soc. 165 (April, 1945).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 200.

TRAYTON L. LATHROP,
Appellant,

VS.

JOSEPH D. DONOHUE,
Appellee.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

BRIEF FOR THE MISSOURI BAR, AMICUS CURIAE.

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APPEAL FROM THE SUPREME COURT OF WISCONSIN.

BRIEF FOR THE MISSOURI BAR, AMICUS CURIAE.

THE INTEREST OF THE MISSOURI BAR IN THIS CASE.

The Missouri Bar is an Integrated Bar, established by rule of the Supreme Court of Missouri adopted June 16, 1944. Our bar is supervised by a Board of Governors whose members are elected by vote of all enrolled lawyers of the state. It is supported by compulsory annual fees

of those engaged in the practice of law in Missouri, and an attorney who is delinquent in the payment of his fees cannot continue the practice of law.[1]

The Appellant apparently challenges the constitutionality of any plan for the integration of a state bar, and argues that a charge of compulsory dues for the support of an integrated bar is likewise unconstitutional. His claim threatens the very existence of the Missouri Bar, and for that reason its Board of Governors has directed the filing of this brief *amicus curiae*. Consent of all parties has been obtained pursuant to paragraph 2 of Rule 42 of this court and is on file in the office of the Clerk.

We have been authorized to say that three other integrated bar organizations, the State Bar Association of Oklahoma,[2] the State Bar of South Dakota,[3] and the Mississippi State Bar,[4] are joining in this brief.

4. Established pursuant to Mississippi General Laws of 1932, Ch. 121.

SUMMARY OF THE ARGUMENT.

The legal profession in the United States has a governmental function, since lawyers have a role which is essential to the process of adjudication. The courts necessarily have the inherent power to regulate the bar; otherwise they would have responsibility without a corresponding authority over an agency instrumental in the discharge of that responsibility.

1. Rules 6 and 7 of the Supreme Court of Missouri, as amended, are set out in the Missouri Revised Statutes, 1949 and supplements, and in Vernon's Annotated Missouri Statutes.

2. Established by order of the Supreme Court of Oklahoma, 185 Okla. 505, 95 P.2d 113.

3. Established pursuant to South Dakota Code of 1939, 1960 Supp., Sec. 32.1118ff.

A state court might reasonably conclude that integration of its bar, consisting of the creation of a public body supported by dues of and subject to control by all lawyers, is an appropriate and desirable means for the exercise of its inherent power of regulation of the legal profession.

Integration of the Bar does not violate the Constitution. The only compulsion is in the payment of dues, which is supported by long-standing precedent. Integration neither compels nor forbids association, and does not purport to control speech at all. It serves proper governmental purposes. The appellant has failed to show any constitutional infirmity in the establishment of the State Bar of Wisconsin.

ARGUMENT.

POINT I.

By the tradition of American government the courts have relied upon the legal profession to aid them in the discharge of their responsibility for the administration of justice. The courts, therefore, must have the inherent power to regulate and to govern the legal profession.

The administration of justice is fundamental to all responsible government, at all times, everywhere. Government has to have the means for arbitrating private disputes, and for protecting society against its internal enemies. An enlightened society is concerned not only with the existence of the machinery for adjudication but also with the means for achieving correct solutions to disputes, with proper resolution of the facts and application of governing law, and also protection for the rights of those accused of crime.

In all American jurisdictions a consistent pattern for the adjudicative machinery has developed. It is not so important to trace the historical development of this pattern as it is to observe the end which has resulted with such consistency. Each of our states places the responsibility for the administration of justice upon a judicial hierarchy, separate from the law-making and law-enforcing branches of the government, and composed of trained lawyers on the bench working with trained lawyers at the bar.

The private practitioners composing our legal profession have a basic and important function in the administration of justice. The courts rely upon the attorneys practicing before them for the proper operation of the judicial process. In civil cases the judges normally delegate the responsibility for bringing out the facts entirely to the lawyers, and the lawyers also have an important function in informing the judges about the governing law. In criminal cases lawyers have an additional function—that of protecting the accused against improper deprivation of life or liberty. In the practice of their private calling, American lawyers actually perform a substantial governmental function.

The public aspects of the practice of law are nicely illustrated when we consider the power of courts to appoint counsel for indigent defendants. This court has held that no person may be convicted of a felony in the federal courts unless he has been offered counsel, if unable to engage his own,[4] and that state courts must furnish counsel to the accused in major cases.[5] But for this special

4. *Johnson* v. *Zerbst*, 304 U.S. 458.

5. See, for example, *Powell* v. *Alabama*, 287 U.S. 45 (capital case); *Uveges* v. *Pennsylvania*, 335 U.S. 437 (minor defendant charged with serious felony).

public character of the legal profession, it would seem that practitioners could claim that they would be deprived of liberty and property without due process of law if required to donate services for which they customarily charge.[6]

Without the partnership of public magistrates and private practitioners, our judicial system would necessarily be very different. The courts of civil law jurisdictions assume an active role in the development of the facts, and the function of civil lawyers appears to be of less importance than is the case in the United States.[7] We believe, however, that, aside from increased expense,[8] something is lost when a litigant is forced to place his primary reliance upon a public official rather than on his chosen individual counsel.

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6. A statute requiring such service without compensation has been held valid. *Brown* v. *Warren County*, 156 Iowa 20, 137 N.W. 474, 42 L.R.A. (N.S.) 527. In the absence of a statute or specific appropriation, it is quite generally held that a court has no means of compensating an attorney for services in representing an indigent defendant. *Baker* v. *State*, 84 Wis. 584, 54 N.W. 1003; *Application of Sullivan*, 297 N.Y. 190, 78 N.E.2d 467.

7. Burdick, William L., *The Bench and Bar of Other Lands* (1939).

p. 288:

> ". . . . France has no skillful cross-examiners for such advocates simply do not exist, no cross-examination of a witness by an advocate is permitted either in a civil or a criminal case,"

p. 413 (speaking of the German civil courts between the two world wars):

> ". . . . as in Civil Law countries generally, the president of the court examines the witnesses and takes charge of the case from beginning to end . . . ."

8. Civilian courts in major private cases normally consist of three judges. *Ibid.*

The reliance by the courts upon the legal profession in the discharge of their responsibilities has given rise to the maxim that lawyers are officers of the court,[9] and to the corollary that the courts have an inherent power to regulate the practice of law.[10] Without such power, the courts would have a responsibility without commensurate controls over the practitioners who have an essential role in the discharge of that responsibility. In a very real sense a court is no better than the lawyers at its bar.

The work of other professions and callings, important to the public that it may be, is not ordinarily a part of the governmental processes. The police power permits regulation of other professions and occupations in the public interest, but such regulation is a matter of legislative choice rather than of inherent power. Control over the practice of law is essential to the proper functioning of the judicial branch of the government. In this regard the legal profession is *sui generis* and stands in contrast to all others.[11]

A basic fallacy in the Appellant's approach is that he regards the legal profession purely as a private calling

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9. *Ex parte Garland*, 4 Wall. 333; *Theard* v. *United States*, 354 U.S. 278.

10. *Ex parte Burr*, 9 Wheat. 529.

11. The case-law of Missouri furnishes an excellent illustration. The case of *In re Richards*, 333 Mo. 907, 63 S.W.2d 672 (1933), holds that the specification of grounds for disbarment in a statute does not preclude a court in the exercise of its inherent power from disciplining or disbarring an attorney for causes not listed in the statute, if such causes appear sufficient to the court. Many cases are cited. In *State ex rel. Inscho* v. *Missouri Dental Board*, 339 Mo. 547, 98 S.W.2d 606 (1936), the court held that a dentist's license could not be revoked on grounds not listed in the governing statute, even though the conduct complained of was generally considered contrary to the ethics of the profession.

while overlooking its public aspect. He fails to see the reason behind the inherent power of regulation, as recognized and exerted by this court and by the highest courts of all states.

POINT II.

The highest court of a state might reasonably determine that integration of the bar is an appropriate means for the exercise of its inherent powers over the legal profession.

State courts in the exercise of their inherent powers over the legal profession are not confined to any particular plan or form of regulation. They are free to select any means of control which appears appropriate and which is consistent with the basic guarantees of the Constitution. This court will not substitute its judgment for that of the state courts on questions of the wisdom or desirability of a particular program of regulation.[12]

The plan of the State Bar of Wisconsin is typical of integrated bars generally and consists of: (1) the creation of a legal entity, or public corporation, to which all lawyers of the state belong, and in which they have the right to participate, and (2) the collection of compulsory dues from all lawyers for the support of the organization so created. The Wisconsin Supreme Court expressly holds that the State Bar of Wisconsin is a public and not a private agency, and cites with approval an annotation describing the integrated bar as a governmental body (R. 75).

Much has been written about how integration of the bar may be expected to improve the administration of

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12. One of the latest of the numerous cases so holding is *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483. The citations, l.c. 488, are particularly relevant.

justice.[13] Without attempting a complete catalog, we suggest that a state court might reasonably conclude that integration of the bar would be of material assistance in the following respects:

(a) As an aid to the court in the control and discipline of the legal profession, and in the suppression of the unauthorized practice of law.

(b) In improving the standard of learning of the legal profession, by working for improvement in the quality of the law schools, and by sponsoring programs for postgraduate legal education.

(c) By a program of educating the public as to the need for legal services and the dangers of handling legal matters without legal advice, thereby helping to eliminate the sources of legal disputes and to relieve the courts of the burden of deciding cases which should never be the subject of litigation.

(d) By encouraging the bar to assume responsibility for regulating and controlling itself, thereby relieving the courts of much of the detail work in the governance of the practice of law.

Progress toward the ends just described is not a matter simply for the benefit of lawyers. Improvement in the administration of justice is a matter of the highest public interest, of concern to every citizen. The very integrity of the state depends upon the maintenance of a sound judicial system. A state court which assumed an indiffer-

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13. The Appellant gives a representative list at pages xiv and xv of his brief. See also William Wicker, "Integrated Bars," 21 Tenn. L. Rev. 708; George E. Brand, "Bar Organization," 34 Jour. Am. Jud. Soc. 38 and "The Integrated Bar", 24 Ohio Bar Journal 591; James Willard Hurst, *The Growth of American Law; The Law Makers*, pp. 279, 288, 292, 365-366.

ent attitude toward progress in the areas just listed, or which left the matter to chance, would not be discharging its proper responsibilities in the judicial system. The courts might well consider, then, that integration of the bar is necessary to promote the general welfare.

The courts might conclude, furthermore, that the ends just described cannot be adequately advanced by voluntary associations. A voluntary association cannot collect dues from every lawyer, and its resources are therefore limited. If it relied on donations, one might fear that large donors would be able to exercise an undue influence in the affairs of the organization. Any action, expression, or opinion emanating from a voluntary association invites scrutiny of the personal interests of the members. The Wisconsin court at one time hoped that a voluntary bar association would be adequate,[14] but its experience was such that it decided to try integration. Its choice, based on experience, should not be lightly set aside.

The federal constitution permits a state to direct integration as a means for the governance of the bar. The aims of integration are proper, and the literature on the subject shows an expectation of substantial benefits. The Appellant is really attempting to convince this court that integration is unwise, and to get the court to translate his own opinions into constitutional principles. His approach is not new, and was effectively answered by Mr. Justice Douglas, as follows:[15]

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike

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14. *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500.

15. *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, l.c. 488.

down state laws * * *, because they may be unwise, improvident, or out of harmony with a particular school of thought.

POINT III.

Integration of the Bar does not deprive the appellant of any particular constitutional rights.

We would not argue for a minute that any of the supposed benefits of integration of the bar would permit its adoption, if it actually violated the constitutional rights of an individual. Both reason and authority demonstrate beyond troubling doubt, however, that bar integration does not deprive persons in the position of the appellant of any constitutional rights.

One of the strongest indications that there is no constitutional infirmity in integration of the bar is the existence of integrated bars in twenty-seven states. The substantially unanimous conclusion of some of our most distinguished appellate judges, sworn and devoted to the protection of constitutional rights, is highly persuasive of constitutional validity.[16]

All that the appellant is actually required to do, by reason of the rules establishing the State Bar of Wisconsin, is to pay an annual fee in order to continue in the practice of law. For years this court has sustained state laws which assess annual fees as a condition of engaging in particular occupations or professions.[17]

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16. See Annotations 114 A.L.R. 161 and 151 A.L.R. 617.

17. *Ficklen* v. *Taxing District*, 145 U.S. 1. In *Royall* v. *Virginia*, 121 U.S. 102, this Court assumed that an annual license fee for lawyers was valid. We consider the argument as to whether the practice of law is a "privilege" or a "right" to be a mere matter of semantics. It has always been held that the practice does not have to be opened to the general public but

Nor is a constitutional issue present simply because the annual dues collected from the lawyers are used for the support of the State Bar of Wisconsin.[18] Activities such as those detailed in the appendix to the opinion of the court below (R. 77-81), and those listed under our Second Point, are proper governmental activities which may be supported by public funds. They are designed for the welfare of the whole public—not of particular individuals. Since the regulation of the legal profession is a matter of expense, those who derive their livelihood from that profession may be required to contribute to that expense. The appellant is not entitled to recover a valid charge employed for a valid purpose. It would seem that the appellant has no standing to recover his enrollment fee unless he can show that the purposes for which it is used are wholly and totally unconstitutional, which they surely are not. Appellant, as a matter of fact, has produced nothing to show any substantial doubt about the constitutionality of any activity of the Wisconsin bar.

There is no validity to the appellant's argument that he has been deprived of freedom of association. The total

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may be limited by the courts to those showing themselves to be qualified professionally and morally; also that a lawyer may be deprived of his license to practice for professional misconduct or moral turpitude. In this sense the practice of law is a privilege. We agree that the privilege must be made available to all who show themselves qualified, on nondiscriminatory grounds, and that it may not be withdrawn except in accordance with due process of law.

18. This Court, as most courts, charges a fee as a condition of admission to practice before it. (Rule 52(f)). We assume that the proceeds are used for the purposes of the court, including the cost of printing briefs and records and travel expenses for counsel appointed by the court to represent indigent parties pursuant to Rule 53.

effect of constituting the State Bar of Wisconsin, and of establishing the appellant as a member is that he is given the opportunity to vote in bar elections and to take part in bar activities, if he cares to. Though this court's assumption of the validity of bar integration in the case of *Railway Employees Department, A. F. of L.*, v. *Hanson*, 351 U.S. 255, may be *dicta*, we think that the point is self-evident. Since the appellant is not obliged to associate with anybody, and may associate with anybody he cares to, there is simply no violation of his right to freedom of association.

Nor is there any infringement of freedom of speech. The appellant does not argue that he is prevented from saying anything, for he is not. He apparently asserts, first, that the voice of the majority of the bar is amplified by reason of integration, so that his dissenting views are muffled, and, second, that since the sentiment of the majority of the bar can be more readily determined, there will be pressure inducing conformity and discouraging dissent. Neither claim has constitutional significance. The court below might feel that in a voluntary association the more prominent, eloquent and successful attorneys would have the unduly strong voice, so that integration would make it easier for the ordinary members of the bar to speak, and would actually relieve against rather than increasing the pressure toward conformity. Such matters of opinion are to be decided by the courts having primary jurisdiction, as questions of judgment, and not by this court as a matter of rigid constitutional doctrine. There is no warrant for a finding that the dire results the appellant prophesies are an inevitable, or even probable, result of integration.

Running through the entire brief is a suggestion that there is constitutional infirmity because the State Bar of

Wisconsin engages in legislative activities. The opinion of the Wisconsin court shows that these activities are required to be limited to matters affecting the administration of justice, and that court states clearly that it will take action if the prescribed limits are exceeded (R. 73). Such limited legislative activities are a proper part of the governmental function of the integrated bar, which is a public body composed of persons having an active part in the processes of government.

The appellant is relegated to arguing that he considers integration unwise, or undesirable. That is the real burden of his brief. This should be addressed to the Supreme Court of Wisconsin alone and the views of that court should not be restricted by this court. The appellant should not prevail in his attempt to have this court substitute its opinions for those of the lower court in matters of judgment and discretion.

CONCLUSION.

If this court accepts jurisdiction, the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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Supreme Court of the United States:

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vs.

JOSEPH D. DONOHUE,
Appellee.

BRIEF FOR THE STATE OF WEST VIRGINIA AMICUS CURIAE

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BRIEF FOR THE STATE OF WEST VIRGINIA AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of West Virginia has a substantial interest in the outcome of this case. The West Virginia State Bar is and has been a force for good government transcending the professional concerns of bench and bar. The legislative and judicial branches of state government, as well as the public generally, have vital interests at stake.

The West Virginia Legislature (Chapter 44, Acts, 1945, Appendix A to this brief) authorized the Supreme Court of Appeals of West Virginia to promulgate rules (a) defining the practice of law; (b) prescribing codes of ethics governing the practice of law and judicial ethics; (c) prescribing procedures for disciplining attorneys at law; (d) organizing and governing *"an administrative*

agency of the Supreme Court of Appeals of West Virginia" as *"a part of the judicial department of the state government"*, to be known as *"The West Virginia State Bar"*, for the purpose of enforcing such rules. All attorneys at law practicing in the state are required to be members and to pay annual fees of $5.00 (since increased to $15.00 by vote of the members). Such Act expressly recognized the inherent rule making power of the Supreme Court of Appeals in the premises and provided that as rules are adopted by the court all laws in conflict therewith shall be of no further force or effect.

Pursuant to this enabling legislation and under the inherent power of the Supreme Court of Appeals, The West Virginia State Bar was created and the purposes of the act effectuated.[1] The Constitution of the State Bar and pertinent excerpts from the by-laws constitute Appendix B to this brief.

There are only three constitutional committees of the State Bar: (1) committee on legal ethics, (2) committee on unlawful practice, and (3) district committees on grievances. (Art. IV).

The State Bar has at all times centered its activities in the important fields of providing effective discipline and curbing unlawful practice.

During the past decade in the interest of protecting the public in the administration of justice, about 149 grievances have been investigated, some 120 hearings have been held by the legal ethics committee, and upward of 100 investigations, including a few court proceedings, have been

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1. On March 28, 1947, an order was entered promulgating rules: (1) defining the practice of law, (2) promulgating a code of professional ethics, and a code of judicial ethics, and (3) the constitution and by-laws of The West Virginia State Bar (amended in 1951 as found in Appendix B). 128 W. Va. xvii-xviii.

conducted by the unlawful practice committee. Typical of activities of the State Bar in the fields of unauthorized practice and discipline, respectively, are the cases of *West Virginia State Bar v. Earley* (W. Va. 1959) 109 S. E. 2d 420, and *Re Philip H. Marcum*, 135 W. Va. 126, 62 S. E. 2d 705 (1950).

The State Bar has not been idle with respect to other appropriate endeavors designed to improve the profession and raise the standards of justice in West Virginia. As reported in 44 Journal of The American Judicature Society (October, 1960), p. 99, this state placed in effect on July 1, 1960, Rules of Civil Procedure modeled upon the Federal Rules. This article correctly notes that the State Bar's Committee on Civil Rules attended meetings over a period of eight years and traveled to all sections of the state for such purposes "at their own expense." The fees collected by the State Bar from its 1624 members have only been adequate to maintain a small office and to do the minimum tasks incident to discipline and unlawful practice. As a result, the out of pocket expenses incident to a function as important as devising improved rules of practice were not paid for by membership dues.

In the field of legislation, the State Bar has primarily devoted itself to informing the bench and bar of pending legislative proposals and has been conspicuously conservative in proposing legislation or taking a position on pending bills.

In addition to the State Bar, The West Virginia Bar Association, a voluntary organization, composed of a large majority of all the lawyers of this state, has continuously functioned since 1886. The voluntary association was and remains a strong proponent of the integrated bar. Since the voluntary association has no official status and lacked subpoena and investigatory powers, it was unable to cope

effectively with the problems of discipline and unlawful practice. While the State Bar and the voluntary association exist side by side, their activities do not overlap. The West Virginia Bar Association has remained active in the legislative field and currently has constitutional standing committees on (1) judicial administration and legal reform, (2) uniform state laws, (3) criminal law and procedure, (4) constitutional provisions, and (5) code corrections and improvement. Thus, in West Virginia, the State Bar, as the official body, performs those functions which it is peculiarly fitted to accomplish, while many other functions are performed by the voluntary association.

West Virginia has an important interest in maintaining its State Bar which has made significant contributions by maintaining high standards of professional conduct, by curbing unlawful practice, and by improving the administration of justice, all to the benefit of the public. Appellant's position in this case manifestly poses a threat to the effectiveness of all integrated bars and perhaps to their continued existence.

ARGUMENT

Inherent Powers of Courts

The validity of the integrated bar is based on the inherent powers of the court to regulate, in a reasonable manner, officers of the court with respect to their professional responsibilities. Transcending in certain respects the attorney-client relationship, in which a lawyer is and should be as independent as a judge, there are certain other public responsibilities incident to the office of attorney at law which must be observed. It appears to be universally recognized that the trust and confidence which must necessarily be reposed in an attorney by both clients and courts require a very high standard of appreciation of the duties owing to the clients, the profession, the court and the public at large.[1] To maintain such standards courts have the inherent power to make investigations and to discipline attorneys engaged in unethical practices; and, also, to prevent unlawful practice by laymen or corporations who may be incompetent and, in any event, are not required to observe any standards of ethics and certainly not the standards expected of a duly qualified lawyer. Courts by their nature and function are not equipped to handle investigations of these subjects and make findings and recommendations with respect thereto. Not only is the necessary administrative machinery lacking for this purpose, but the courts may ultimately be required to make decisions and impose sanctions with respect to the subject of the investigation.

It is believed that the rise in American integrated bars resulted in part from changes in the problems of discipline and unlawful practice of the past seventy-five years. A

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1. For an apposite statement see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 247, (1957).

court can observe personally but a small part of the activities of lawyers. The profession has dramatically changed from a bar of advocates "riding circuit" with the judges to one of predominantly office practice. The complexities of modern life have necessitated a vast enlargement of the function of the lawyer, both in and out of the court room. The problems of unlawful practice have likewise grown in scope and complexity. Today, the trial court can spot an interloper in the ranks of advocates, but finds it very difficult to deal with the ingenious "consultant" who so often without scruples or competency engages in unlawful practice to the great detriment of the public.

Although somewhat cautious and slow to act, courts are not powerless to deal with situations vital to the integrity of bench and bar and the improvement of justice. The right of the court to make reasonable rules in the premises is unchallenged. The issue posed by this case appears to be whether it is reasonable and proper for the court to establish an integrated bar as an administrative agency to enforce its rules. Since a court can clearly apply proper rules and regulations to an individual member of its bar, as an officer of the court, is his constitutional liberty placed in jeopardy by an organization of all such officers for the purpose of coordinating and enforcing such rules?

An analysis of the essential nature of an integrated bar will dispel apprehension of violation of freedoms which the bar, above all others, has protected throughout our history. Confronted with the problems of discipline and unlawful practice and need for improving the administration of justice, it is natural and proper that a court would turn to its bar for help and cooperation. Doubtless the court could set up committees of the bar or ask a voluntary association to do the job. This in fact has frequently been done over the years but without conspicuous success largely because a committee is local in character and lacks state-wide

objectivity and official status. Furthermore, court appointed committees represent but a small minority of the bar. Even active and large voluntary associations fail to represent a significant minority. Should powers adequate to cope with discipline and unlawful practice be conferred on a voluntary association or committee? Since these problems are of vital concern to every member of the bar, it appears more reasonable that with the participation of all practitioners a more effective solution can be reached. Moreover, the rights of the minority receive full protection. The West Virginia State Bar is a model of the democratic process. Each lawyer not only has an equal voice, but the by-laws assure that each voice is effective. The least influential, the most eccentric, the poorest, the dissident—each can vote secretly for a member of the board of governors. The board is representative and it selects officers and the committees. The court has simply reposed in the whole bar the opportunity and responsibility of selecting committees and officers to administer the court's rules. While not perfect, because it is a human agency, the integrated bar has functioned well.

Compulsory Membership

The integrated bars require all practitioners to be members and pay dues annually. The issue of compulsion raises a spectre. Compulsion is more apparent than real. Stripped of rhetoric, the fact is that every practitioner must be first legally admitted to the bar by meeting the tests of education, bar examinations and good moral character. He is and must remain a member in good standing of the bar to practice the profession. Whether the bar is integrated in no wise changes these fundamentals. In every essential respect there is no difference in this state between the requirement of being a member of the bar of the Supreme Court of Appeals and being a member of the State Bar, the agency of the court.

The integrated bar does not violate freedom of association. A member of the West Virginia State Bar enjoys every freedom to associate or not to associate that he could claim as a member of the bar of the Supreme Court of Appeals, absent integration.

The issue here is the reasonableness of court rules applied to members of the bar individually or as a whole. Integration *versus* "disintegration" is hardly a question fraught with constitutional issues.

Compulsory Payment of Fees

Here again, appellant appears to beg the question. An annual fee to engage in the practice of a profession is not uncommon and is properly within the powers of the state. While state revenues might properly be used to maintain discipline of the legal profession and contain unlawful practice, it is good policy to provide that the costs thereof be defrayed by the lawyers themselves. Lawyers generally prefer that taxes they pay be used for matters of immediate interest to them.

Every lawyer has an important stake in matters of discipline, unlawful practice, and improving the administration of justice. Each has an interest in these subjects professionally, and, also, in a more mundane sense, his financial rewards from the profession depend in some measure upon the maintenance of the integrity of the bar.

It is submitted that the nominal fees of integrated bars are reasonable exactions and in the public interest.

Freedom of Assembly and Association

Appellant urges "freedom to move in and out of an association." This libertarian generality has little, if any, relevancy to the issue here. An integrated bar is not an association within the meaning of that concept. Admission to the bar is conceded to be subject to reasonable regulation at all times. A lawyer is not always free to resign or retire from the profession if his purpose is to defeat disciplinary action. He cannot, once having been retained, retire as counsel without good cause. No person is free to become a member of the bar at will. Membership in a state bar is the equivalent of being lawfully licensed to practice. Within its proper sphere of administering rules of the court a state bar possesses a status separate and distinct from an association. An integrated bar coordinates professional activities of lawyers with respect to matters of discipline, unlawful practice and kindred matters of concern to the whole bar.

Appellant's argument on this point carried to its logical conclusion would deny to the states the right to compel school attendance. Compulsory education involves more stringent limitations on personal liberty, freedom to associate or not associate, to express or refrain from expressing opinions and beliefs, than perhaps any other governmental activity. Yet the public interest requires compulsory school attendance as it does reasonable regulation of the practice of law.

The Integrated Bar Is Not A Guild Or Political Party

State bars are not established to foster a monopoly or provide economic control of the practice of law. The profession, with or without an integrated bar, is closed to those who cannot meet the tests of good moral character, prescribed educational standards, bar examinations and,

in some instances, internship in an approved law office. The standards of ethical conduct must be maintained throughout a lawyer's professional life. The primary purpose of The West Virginia State Bar is to administer rules relating to the practice of law, most, if not all of which had been recognized and in effect for years.

The State Bar is authorized to take action only in the professional field and there but in a reasonably limited way. Its every action is subject to the restraint of deliberation by a body of professionals notoriously independent and at times contentious. Significantly, the court at all times has the power to change its rules, at will, and would not hesitate to do so in the event of abuse or unreasonable action.

The best test of denial of freedoms is experience. The "consent of the governed" is not an empty phrase to lawyers. What other body of men is so sensitive to arbitrary or unreasonable exercise of power? The almost universal agreement by the profession and the public that the integrated bar, where it exists, is a worthwhile and reasonable measure is strong evidence that there has been no arbitrary action or denial of freedoms.

Freedom of Opinion and Speech

Appellant labors the contention that an integrated bar unconstitutionally impairs freedom of conscience and speech within the meaning of the First Amendment.

In truth the state bar affords an opportunity and invitation to each individual to express his opinion on matters of professional concern. Moreover, no restriction or sanction is imposed on the minority or dissident. They are free to oppose the majority at any time and, being lawyers, they often do. No one is compelled either to speak or remain

silent. Each member is free to do as he chooses. Being professional adversaries, the bar expects and respects dissenters. The entire spectrum of views on the law, religion, philosophy, politics and every other subject exists among members of the bar. The beliefs and opinions of the individual are not subject to any restriction by the state bar.

Rarely, if ever, is there unanimous agreement on any subject. Even the Signers of the Constitution of the United States were not of one mind. The deliberations of the Convention reveal the widest range of opinion and compromises were made to the full satisfaction of no one. Because of the widespread fear that many delegates would refuse to give their individual assent to the final draft of the Constitution, in order to give the appearance of unanimity, Gouverneur Morris devised his famous formula "Done in convention by the unanimous consent of the States present . . .", which did not require the delegates to evidence their individual approval by signing. Even with this "state consent" formula several delegates refused to sign and thereafter the delegates freely argued the merits of the proposed Constitution.

Our Constitution was forged by healthy debate and reconciliation of differing views. The state bars function on the same principle. The rights of the minority are protected fully within the meaning of the constitutional freedoms.

Freedoms are without meaning except as related to human experience, desires and purposes. Webster, who had more than a cursory understanding of the constitutional and political aspects of the subject, held that "Liberty exists in proportion to wholesome restraint." Members of the bar historically have been the protectors of our freedoms, yet the bar has recognized the correlative responsibility of maintaining the highest standards of professional

integrity, knowing that without unquestioned integrity the bar cannot perform its duties effectively.[1]

Does freedom of speech authorize the doctor, the priest and the lawyer to publicize confidential communications? Does the First Amendment contemplate that a member of a court is free to divulge the secrets of the conference or announce decisions on his own? As was stated in a recent concurring opinion of this court:

> "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Re Sawyer, 360 U. S. 622, 646 (1959).*

The important concern of the public, bench and bar in the matter of discipline and unlawful practice can be met reasonably and effectively through the agency of the integrated bar without denying to anyone the full force and vigor of constitutional freedoms.

It is submitted that the integrated bar was conceived and functions within the traditional framework of American constitutional freedoms and that it is a reasonable exercise of administrative procedures conducive to the public good. That it will remain so is assured by the traditions of the profession and the power of the court to deny or restrict, at will, state bar powers, if this should ever become necessary.

Human dignity and freedom for the individual hang in the balance the world over in these critical times. This court with courage and vigor has breathed new life into the Bill of Rights.

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1. Santayana aptly says that liberty is ". . . . not freedom to wander at hazard or to let things slip, but on the contrary freedom to legislate more precisely, at least for oneself, and to discover and codify the means to true happiness." Essay on Classic Liberty.

State courts in establishing the integrated bar have contributed to the protection of freedom by strengthening the profession, whose members are the sworn defenders of liberty, no matter how unpopular the particular cause may be. The vigor, integrity, honor and independence of lawyers have been furthered by the coordination of their professional efforts through bar integration and without denying to any individual his full constitutional rights.

Conclusion

An analysis of the purpose, function and structure of the integrated bar demonstrates that it does no violence to the Bill of Rights as interpreted by this Court in the cases so ably discussed by counsel for the parties.

Accordingly, it is submitted that there is no substantial federal question raised and that appellee's motion to dismiss should be sustained, or that this case should be affirmed.

Respectfully submitted,

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APPENDIX A

WEST VIRGINIA STATE BAR ACT

(W. Va. Code 51-1-4a, Michie's Code § 5183(1)).

§ 5183(1). (4a) *Rules Governing the Practice of Law; Creation of West Virginia State Bar; Providing Its Powers, and Fees for Administration.*—The Supreme court of appeals of West Virginia shall, from time to time, prescribe, adopt, promulgate, and amend rules:

(a) Defining the practice of law.

(b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law and the practice of law, and prescribing a code of judical ethics.

(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys-at-law.

(d) Organizing and governing by and through all of the attorneys-at-law practicing in this State, an administrative agency of the supreme court of appeals of West Virginia, which shall be known as "The West Virginia State Bar". The West Virginia state bar shall be a part of the judicial department of the state government and is hereby created for the purpose of enforcing such rules as may be prescribed, adopted and promulgated by the court from time to time under this section. It is hereby authorized and empowered to perform the functions and purposes expressed in a constitution, by-laws and amendments thereto as shall be approved by the supreme court of appeals from time to time. All persons practicing law in this State shall be members of the West Virginia state bar in good standing: Provided, however, that the West Virginia state bar shall not become operative until its constitution and by-laws shall first have been submitted to all attorneys-at-law practicing in this State, including those presently serving in the armed forces of the United States, for the purpose of securing the suggestions and recommendations of all such attorneys-at-law, for a period of at least sixty days prior to the entry of an order by such court approving said constitution and by-laws.

(e) Fixing a schedule of fees to be paid by attorneys-at-law practicing in the State of West Virginia for the purpose of administering this section, and providing for the collection and disbursement of such fees: Provided, however, that the annual fees to be paid by any attorney-at-law shall not exceed the sum of five dollars, unless a majority of the attorneys-at-law practicing in this State consent to the payment of a higher annual fee.

The inherent rule-making power of the supreme court of appeals is hereby declared.

When and as the rules of the court herein authorized shall be prescribed, adopted, and promulgated, all laws and parts of laws that conflict therewith shall be and become of no further force or effect to the extent of such conflict. (1945, c. 44.)

APPENDIX B

CONSTITUTION AND PARTS OF BY-LAWS OF WEST VIRGINIA STATE BAR

(Adopted at the Annual Meeting on October 7, 1950, and approved by the Supreme Court of Appeals on April 10, 1951.)
2 Michies W. Va. Code 111—120 (1955)

CONSTITUTION

ARTICLE I

Name and Location of Office

This agency of the Supreme Court of Appeals of West Virginia shall be known as "The West Virginia State Bar". Its principal office shall be maintained in the Capitol of the State of West Virginia, or at such other place as may be designated by the Board of Governors.

ARTICLE II

Objects and Purposes

The object of The West Virginia State Bar shall be to protect the interests of the public; to advance the administration of justice and the science of jurisprudence; to improve the relations between the public and the Bench and the Bar; to uphold and elevate the standards of honor, integrity, competency and courtesy in the legal profession; and to encourage cordial relations among its members.

It is the purpose of The West Virginia State Bar to give effect to pertinent rules of the Supreme Court of Appeals of West Virginia, and to perform the functions expressed in this Constitution and By-Laws.

ARTICLE III

Membership

The membership of The West Virginia State Bar shall consist of all persons lawfully admitted to the practice of the law in the State of West Virginia. No person shall practice law in the State of West Virginia unless he is an active member in good standing of The West Virginia State Bar.

ARTICLE IV

Government; Board of Governors; Officers and Committees

The West Virginia State Bar shall be governed by a Board of Governors. There shall be a Committee on Legal Ethics and a Committee on Unlawful Practice. There shall also be for each State Bar District

created by the By-Laws a Committee on Grievances. Such Board shall select a President, a Secretary-Treasurer, and the members of said committees. Such Board may from time to time create, alter and terminate other offices and committees, with such powers, authority and duties as it may deem proper. All officers, except the Secretary-Treasurer and administrative assistants, and the members of such committees shall be selected either from the membership of such Board or from The West Virginia State Bar.

ARTICLE V

Meetings

The members of The West Virginia State Bar shall convene in one general meeting each year, which shall be known as the Annual Meeting, and in such special meetings as shall be called by the Board of Governors. Such meetings shall be held at times and places fixed by said Board. The members present at an annual or a special meeting shall constitute a quorum.

ARTICLE VI

Amendments

Subject to the approval of the Supreme Court of Appeals of West Virginia, this Constitution may be altered at any annual meeting on recommendation of the Board of Governors by vote of a majority of the members present or, without such recommendation, by vote of two-thirds of the members present.

BY-LAWS

ARTICLE I

Definitions

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ARTICLE II

Members

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§ 3. **Active Membership.**—An active member in good standing shall be a person lawfully admitted to the practice of the law in the State of West Virginia, who is lawfully engaged in the practice of the law in this State, who is enrolled as an active member, who is not under suspension, and who shall each year duly pay the annual active membership fee to the State Bar.

§ 4. **Enrollment as an Inactive Member.**—Any member of the State Bar not under suspension, who does not desire to engage in the practice of

the law in this State, may, upon written request to the Secretary, be enrolled as an inactive member. Every Judge of a court of record of this State shall be enrolled as an inactive member during his continuance in such office. No member of the State Bar practicing law in this State, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he is called upon to or does give legal advice or counsel or examine the law or pass upon the legal effect of any law, transaction, instrument (whether or not of record), or state of facts, except Judges of courts of record, shall be enrolled as an inactive member.

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ARTICLE III

Active Membership Fees

§ 1. **Amount.**—The annual membership fee for active members shall be fixed by the Board and shall not exceed the sum of Ten Dollars ($10.00) unless consent to a higher fee is secured as hereinafter provided. Any time the Board shall desire to increase the annual membership fee, it shall submit the proposed increase to all the active members, by mail, and if a majority of the members voting consent to the proposed increase, the Board may put such increased dues into effect upon securing the approval of the Supreme Court of Appeals. In any such mail vote, the Board may include in the question to be voted upon, a provision fixing the annual membership fee of active members who have been admitted to practice law for not more than five (5) years in West Virginia or any other jurisdiction at Ten Dollars ($10.00), irrespective of the fact that the approval of the proposal submitted will result in an increase in the membership fee for all other active members of the State Bar.

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§ 3. **Penalty for Nonpayment of Membership Fees.**—On the 1st day of September of each year, a penalty of $2.00 shall be added to all delinquent active membership fees. On or after this date, the Secretary shall notify all members in default in the payment of membership fees of their delinquency and that the penalty has attached. Such notice may be given by United States mail, addressed to such member at his last known post-office address.

§ 4. **Suspension for Nonpayment of Membership Fees.**—If a member remains in default for thirty days after the date of mailing the notice provided by the preceding section, he shall be automatically suspended from active membership in the State Bar and shall not further engage in the practice of law until he has been reinstated. The Secretary shall give notice of such suspension to the Judges of the courts of record of the Judicial Circuit in which such delinquent member principally

practices, as well as to the Clerk of the Supreme Court of Appeals, and it shall be the duty of said Judges and of the Supreme Court of Appeals to refuse and deny to such member the privilege of appearing and practicing in said Courts, until such time as such member shall have been reinstated as an active member. Written notice of such suspension shall be given to such suspended member and service thereof shall be complete upon mailing the same addressed to such suspended member at his last address appearing upon the records of the State Bar. It is the duty of every member of the State Bar to keep informed relative to the payment of his dues, and failure to receive notice of nonpayment or of suspension shall not affect the operation of such suspension.

§5. **Reinstatement of Members Suspended for Nonpayment of Membership Fees.** —Whenever a member suspended for nonpayment of membership fees shall have paid all accrued fees and penalties and been reinstated, the Secretary shall thereupon give notice thereof to the Judges of the courts of record in the Judicial Circuit in which such member principally practices, and to the Clerk of the Supreme Court of Appeals.

ARTICLE IV

Board of Governors

§1. **Powers and Duties.** —The powers of the State Bar shall be exercised by the Board of Governors.

The Board shall have general charge of the administration of the affairs of the State Bar and it shall diligently and vigilantly formulate such policies and do such things as and when in its judgment may be necessary and proper for the accomplishment of the objects and purposes of the State Bar.

The Board may establish, and may combine and terminate, standing, administrative and special committees as it may deem advisable, and may vest in and delegate to such committees such of its jurisdiction, functions, powers and authority as it may deem proper. Such committees may be composed of its own members or of members of the State Bar. The members of such committees shall hold office at the pleasure of the Board.

The Board may establish, and may combine and terminate, Sections of the State Bar, and may establish foundations and special funds for the furtherance of the objects and purposes of the State Bar and receive contributions to such foundations and special funds from members and others.

The Board may promulgate, and may amend and revoke, rules and regulations for the transaction of its business, for the procedure in meetings of members of the State Bar, for the procedure and reports

of committees and Sections, and for the general administrative conduct of the State Bar.

The Board shall fix salaries and provide for the payment thereof and of other necessary expenses of the State Bar. It shall cause proper books of account to be kept, have them audited at least annually, and have presented to each annual meeting a statement of the receipts and expenditures of the State Bar.

The enumeration above and elsewhere in these By-Laws of particular powers or duties of the Board, or of officers or committees, shall not be deemed to imply any denial of, or any restriction or limitation upon, the general and plenary powers of the Board to govern and administer the State Bar and to exercise all its powers.

§ 2. **Membership.**—The Board of Governors shall consist of eighteen members, as follows:

(a) The President;

(b) The retiring President for the first year of his retirement, and,

(c) One Governor from each of the State Bar Districts herein established.

§ 3. **Election and Term.**—In the year 1951 an election shall be conducted for Governors in all the State Bar Districts, for terms as follows:

(a) One member each from State Bar Districts 1, 2, 3, 4 and 5 for a term of one year;

(b) One member each from State Bar Districts 6, 7, 8, 9 and 10 for a term of two years; and,

(c) One member each from State Bar Districts 11, 12, 13, 14, 15 and 16 for a term of three years.

In each year thereafter, Governors shall be elected, each for three year terms, from the State Bar Districts in which vacancies occur in that year by reason of the expiration of the term of office of a Governor theretofore elected. No Governor who has served three years shall be eligible to succeed himself.

The term of office of each Governor shall commence at the conclusion of the annual meeting next succeeding his election, and he shall hold office until his successor is elected and qualified.

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§ 5. **Governors.**—A Governor shall have his principal office for the practice of the law in the State Bar District which he represents, and

his removal thereof from such district shall forthwith terminate his Governorship. A Governor shall be an active member of the State Bar in good standing, and his loss of that status in any manner shall forthwith terminate his Governorship.

§ 6. **Nomination of Governors.**—Nomination for the office of Governor shall be by written petition signed by not less than ten members of the Bar in the District where such nominee has his office, except that where there are fewer than ninety members in such district, the signatures of ten per cent of the members shall be sufficient. No member shall sign more than one nominating petition in any year. If in any year the Secretary does not receive within the time fixed by the Board, from any State Bar District for which a Governor is to be elected in that year, a petition nominating an eligible person for Governor, the President shall appoint a committee from the Board, and that committee shall nominate at least two eligible persons.

§ 7. **Election of Governors.**—Each Governor shall be elected by a secret mail vote of the active members of the State Bar having their principal offices for the practice of the law in the State Bar District in question. Such elections shall be conducted and canvassed, and any tie votes determined by lot, in accordance with such rules and regulations as the Board may promulgate from time to time. In every such election the ballots shall be returned to the Clerk of the Supreme Court of Appeals and remain in his custody until canvassed.

* * * * *

ARTICLE VI

Procedure for Disciplining, Suspending and Disbarring Attorneys-at-Law

Memo.: This Article, prescribed, adopted and promulgated as a rule of the Supreme Court of Appeals of West Virginia, supersedes the "Procedure for disciplining, suspending and disbarring attorneys-at-law", promulgated by an order of said Court, entered on March 28, 1947, and, to the extent of any conflict, renders of no further force or effect any laws and parts of law that conflict herewith.

§ 1. **Duties.**—The standard of professional ethics and conduct of the Bench and Bar of the State of West Virginia is of the highest importance to the people of the State, to the State itself, and to the members of the legal profession. It is incumbent upon every member of the profession, and particularly upon those who have undertaken the responsibilities and authorities of judicial preferment, to actively uphold those standards and to act diligently and vigilantly in the investigation and prosecution of violations of those standards.

It shall be the duty of every member of the State Bar to make full report to the Secretary concerning every breach of professional standards which shall come to his attention.

§ 2. **Grounds for Action.**—Every member of the legal profession shall observe the highest standards of professional conduct. The canons of ethics promulgated by the Supreme Court of Appeals of West Virginia now or hereafter in effect shall be carefully observed. Any allegation of: violation of such canons; the commission of a criminal offense showing professional unfitness or moral turpitude; the detention of any property or money collected in any professional or fiduciary capacity without bona fide claim thereto; the solictation of professional business; or any conduct involving fraud or deceit, shall, among other things, constitute good grounds for investigation as hereinafter provided and, if deemed warranted, for the institution of appropriate proceedings.

§ 3. **Remedies Cumulative.**—Nothing in this Article contained shall be deemed to interfere with the inherent powers of any court.

Part A—Committee on Legal Ethics.

§ 4. **Creation; Jurisdiction.**—There shall be a committee, known as "The Committee on Legal Ethics of The West Virginia State Bar", which shall have jurisdiction of all matters respecting legal ethics, unprofessional conduct, malpractice and, in the most general sense, the professional standards of the Bench and Bar of West Virginia, whether arising before or after the promulgation of these rules.

Such committee shall, on its own motion, or upon the request of the Board or the President, or upon the request of any court of record or judge thereof, or upon the verified complaint of any person, as to any matter within its jurisdiction, make investigations, dismiss complaints and requests, administer reprimands, issue charges, hold hearings, institute proceedings, and do all such other acts as are authorized in this Article.

Such committee shall proceed, in any matter or act mentioned or referred to in the two preceding paragraphs, in the name of The West Virginia State Bar, or in the name of such committee, or in the name of any authorized sub-committee or member or members, as it may deem proper.

Such committee may render advisory opinions on any question of professional conduct. It may investigate and approve or disapprove publications in the nature of legal lists or directories as a medium of professional listing of members of the State Bar.

With the consent of the Board, such committee may promulgate, and amend and revoke, rules and regulations for the transaction of its business.

The enumeration above and elsewhere in this Article, of particular powers and duties of such committee, shall not be deemed to imply any denial of, or restriction or limitation upon, the responsibility of such committee, and its general and plenary power, to exercise all the powers of the State Bar in regard to the professional standards of the Bench and Bar of West Virginia, and no action of the Board shall be required to authorize the exercise of such powers.

§ 5. **Members; Terms; Vacancies; Removals.** — The Committee on Legal Ethics shall consist of seven members, selected by the Board from the active members of the State Bar. When first constituted, three members shall be selected for terms of one year, two for terms of two years, and two for terms of three years. Thereafter, in each year, members shall be selected, each for three year terms, to fill vacancies occurring in that year by reason of the expiration of the terms of office of members theretofore selected. Vacancies occurring for other reasons shall be filled by the Board for the unexpired terms. If a member of such committee be determined by the Board to have become incapacitated from performing his duties as such member, or be absent from any two consecutive meetings of such committee, without cause deemed adequate by the Board, he may be removed by the Board. The term of office of each member shall commence at the conclusion of the annual meeting designated by the Board in making his appointment.

§ 6. **Officers; Sub-Committees.**—For such committee a Chairman and a Vice Chairman shall be designated annually by the Board from the members of such committee. Such committee may designate other officers and sub-committees, from its own members, with such of its powers and responsibilities as it may deem proper.

§ 7. **Meetings: Quorum.**—Such committee shall meet, at any place in the State of West Virginia, upon call of its Chairman or Vice Chairman, or upon call of the President of the State Bar. Upon written request of five Governors the President or Secretary shall call a meeting of such committee.

Three members of such committee shall constitute a quorum.

§ 8. **Summons and Subpoena Powers.**—In any investigation or hearing under this Article, such committee, any Grievance Committee, any authorized member of either thereof, or any Governor or officer of the State Bar shall have the power, by summons or subpoena issued under the hand of any authorized member of either committee or of any

Governor or such officer, to summon and examine witnesses under oath administered by any member of said committees, any Governor or such officer, and to compel their attendance and the production of any and all books, papers, letters and other documents necessary or material to the inquiry.

§ 9. **Effect of Summons or Subpoena.**—Any such summons or subpoena issued as provided in the preceding section shall have the same force and effect as a summons or subpoena issued by a Circuit Court of the State of West Virginia. If any witness or other person shall fail or refuse to appear, or to be sworn, or to testify, or to produce books, papers, letters or other documents demanded, upon application to a Circuit Court or the Judge thereof within the Congressional District in which any investigation or hearing is being conducted, a rule or an attachment shall be issued against such witness or other persons as in cases of contempt.

§ 10. **Reports.**—Such committee shall report to the Secretary in writing immediately upon initiating any investigation or other action, and shall thereafter report to him from time to time the status thereof, and upon final disposition of any matter shall forward to him a report thereon with the complete file thereof.

Part B—Complaints and Investigations.

§ 11. **Complaints.**—Any complaint made or received by any member of the State Bar shall be forwarded by him to the Secretary. The Secretary shall also receive complaints from any court or judge, and from the public. The Secretary shall make a record of each such complaint and forthwith refer it to the Committee on Legal Ethics.

§ 12. **Investigations; Reprimands.** — Without issuing any notice or charges, such committee shall investigate, or cause to be investigated by its sub-committee or by the proper Grievance Committee, to the extent deemed necessary, every complaint, request and information coming before it, and said Legal Ethics Committee may dismiss the same, or may administer reprimands, or may take any other action authorized by this Article, as in its judgment may be warranted.

Part C—Formal Hearings.

§ 13. **Formal Hearings.**—Such Legal Ethics Committee may, but shall not be required to, hold a formal hearing on any matter before it.

§ 14. **Procedure.**—At least ten days prior to any such formal hearing, a notice of the time and place of the hearing, containing a plain statement of the charges against him, shall be served upon any accused person in person or by registered mail at his last known address. Such hearing shall be held in the county in which he resides, or in which

he has his principal office, or in which the alleged offense, or any part thereof, was committed, as the committee may determine. The rules of evidence applicable in equity cases shall govern at such hearings. Evidence may be taken by deposition according to the procedure in equity cases. An accurate record shall be made of the proceedings at such formal hearings, unless waived in writing by the accused person.

§ 15. **Prosecution.**—The charges at any such hearing may be prosecuted by any member or members of said committee or by counsel (not a member of said committee) appointed by the Board or President on the request of said committee. It shall be the duty of each attorney-at-law so appointed to prosecute such charges diligently and to the best of his ability.

§ 16. **Rights of Accused Person.**—Any person so accused may be represented by counsel at such hearing. He shall have the right to have summons and subpoenas issued in his behalf by any person so authorized in this Article. He shall be intitled, at his own cost, to a copy of the record of the hearing.

§ 17. **Determination.**—Upon the termination of such hearing by said committee, it shall consider the case, and it may dismiss the charges, or may administer a reprimand, or may take any other action authorized by this Article, as in its judgment may be warranted.

Part D—Institution of Proceedings by Committee.

§ 18. **Choice of Procedure.**—If the Committee on Legal Ethics be of the opinion, after such investigation and hearing, or either, as it may deem proper, that a charge of annulment or suspension of license is merited, it may proceed under this Part D or in accordance with any applicable procedure under Part E of this Article, or both, as the committee may determine.

§ 19. **Institution of Proceeding.**—When said committee shall decide to proceed under this Part D, it shall file in the Circuit Court of the county in which the accused person resides, or in which he has his principal office, or in which the alleged offense, or any part thereof, was committed, or which otherwise has jurisdiction, as the committee may determine, a verified complaint, with such report of the proceedings before it as it may deem advisable, and with a recommendation.

§ 20. **Procedure.**—Upon the filing of such complaint, report and recommendation, such court shall issue an order to the accused to show cause why said recommendation should not be put into effect by a court order. Such order shall be returnable not more than ten days from the date of its entry. Upon failure of the accused to appear and deny the charges, the court shall forthwith examine the papers filed

and shall suspend or annul the license of the accused attorney as in its judgment shall seem right. If the accused shall appear and deny the charges, the matter shall be forthwith considered by the court on the record of the papers filed, unless good cause be shown for further hearing, in which event a day certain, not more than twenty days after the return day of the order to show cause, shall be set for such hearing. If the accused be found guilty by the court, on the record or on such further hearing, the court shall suspend or annul his license, or shall administer a public reprimand, which shall be made a matter of record in said court, as in its judgment shall seem right. All such matters shall be heard and determined by the court without a jury. The court shall give due weight to the recommendation of the committee.

§ 21. Prosecution.—The charges in any such proceeding may be prosecuted by any member or members of said committee or by counsel (not a member of said committee) appointed by the Board or President on the request of said committee. It shall be the duty of each attorney-at-law so appointed to prosecute such charges diligently and to the best of his ability.

Part E—Other Proceedings.

§ 22. Definition.—In this Part E unless the context or subject matter otherwise requires, "court" means the Supreme Court of Appeals of West Virginia or any court of record of this State, except a county court.

§ 23. Annulment on Conviction.—Any court in which any attorney shall be convicted of any crime involving moral turpitude or professional unfitness shall, as part of the judgment of conviction, annul his license to practice law.

Any court before which any attorney has been qualified, upon proof that he has been convicted—

(a) Of any crime involving moral turpitude or professional unfitness; or,

(b) Of receivng money for his client as his attorney and failing to pay the same on demand, or within six months after receipt thereof, without good and sufficient reason for such failure, as in the statute provided; shall annul his license to practice law.

§ 24. Suspension on Conviction.—Any court before which any attorney has been qualified, upon proof that he has been convicted of any felony not involving moral turpitude or professional unfitness, shall suspend his license to practice law for such time as the court may prescribe.

§ 25. Suspension or Annulment for Malpractice. — If any court observe any malpractice therein by any attorney, or if a verified complaint be made to any court of malpractice by any attorney therein, such court shall order the attorney to be summoned to show cause why his license shall not be suspended or annulled. A summons shall thereupon be issued by the clerk of such court containing a copy of the charges and requiring the attorney to appear and answer the same on a day to be named therein, not more than twenty days from the date of issuance. Such summons may be served in the same manner as a summons commencing an action may be served, and the service shall be made at least five days before the return day thereof. Upon the return of the summons executed, if the attorney appear and deny the charge of malpractice, the court shall, without a jury, try the same. If the attorney be found guilty by the court, or if he fail to appear and deny the charge, the court may either suspend or annul the license of such attorney as in its judgment shall seem right.

§ 26. Suspension for Failure to Pay Money. — Whenever a judgment or decree shall be standing or rendered in any court against an attorney for money collected by him as such, such court shall suspend the license of such attorney until such judgment or decree shall be satisfied.

Part F—Reinstatement.

§ 27. Reinstatement from Suspension; Necessity. — When for any reason the license of any person to practice law has been or shall be suspended, whether or not for a limited time or until restitution or some other act be made or done, such person shall not become entitled to engage in the practice of law in the State of West Virginia, whether such time has elapsed or such restitution or other act be made or done, until such person shall have been restored to good standing as a member of the State Bar as herein provided.

§ 28. Procedure for Reinstatement from Suspension. — A person whose license has been or shall be suspended, who shall desire reinstatement, shall file a petition with the Secretary of The West Virginia State Bar, addressed to the Board of Governors thereof, reciting the cause of his suspension and stating what he shall have done by way of restitution or other act, by reason of which he believes he should be reinstated. Said Secretary shall refer such petition to the Committee on Legal Ethics, which shall promptly make such investigation thereof as it may deem proper, and report thereon to said Board, which shall consider such petition and report, and if satisfied that such restitution has been fully made or other act fully done, and that such person is otherwise worthy to engage in the practice of the law, and that such person has paid all accrued membership fees and penalties, shall determine such person to be reinstated, and that his license is restored in full force and effect, and that he is restored to good standing as a member of the State Bar.

Part G—General Provisions.

§ 29. Statewide Effect of Annulment or Suspension of License.—Any annulment or suspension of a license to practice law shall operate and be effective throughout the State of West Virginia.

§ 30. Effect of Annulment.—The annulment of a license to practice law by any court of competent jurisdiction shall revoke and forever terminate such license, and shall constitute a disbarment.

§ 31. Report by Clerk of Suspension or Annulment.—The clerk of any court, in which any order in regard to the suspension or annulment of a license to practice law shall be made, or in which a reprimand shall be entered of record, shall promptly certify a copy of the same to the Secretary of the State Bar.

§ 32. Security for Good Behavior; Contempt.—Nothing in this Article shall affect the right of any court to require from an attorney therein security for his good behavior, or to fine him for contempt of court.

§ 33. Appeals.—An appeal shall lie from any court of record of limited jurisdiction established under the provisions of section nineteen of article eight of the Constitution of this State, to the circuit court of the county, and from any circuit court to the Supreme Court of Appeals of the State, from any order suspending or annulling, or refusing to suspend or annul, the license of any attorney proceeded against under the provisions of this Article, but no application for any appeal from any order of suspension or annulment shall be entertained by any such court unless the applicant shall, at least thirty days prior to the making of such application, have given notice to the Secretary of the State Bar of his intention to apply for such appeal, together with a copy of the petition therefor. And on any such application, and on the hearing of any such appeal, the State Bar shall be heard by such court.

§ 34. Suits, etc., in Regard to Licenses; Notices.—If any person shall desire to institute any action, suit or proceeding in any court or to make any application to any court or to the judge of any court in regard to any alleged right claimed by him to practice law in this State, or in regard to any annulment of his license to practice law in this State, he shall, not less than thirty days prior to such institution or such application, give notice to the Secretary of the State Bar of his intention so to do. Such notice shall state the court or judge to which he will apply and shall set forth all pertinent facts in relation to his petition and shall be accompanied by all pertinent data, papers, documents and records. The Secretary shall refer the same to the Legal Ethics Committee, which shall promptly make such investigation thereof as

it may deem proper, and shall report thereon to such court or judge, with its recommendations. Such report and recommendations shall become part of the record of the case, and shall be given due weight by such court or judge. In any such action, suit or proceeding or on any such application, the State Bar shall be heard by such court or judge. Nothing in this Section or elsewhere in these By-Laws contained shall be construed as conferring upon any person any right to institute any such action, suit or proceeding or to make any such application.

ARTICLE VII

Committee on Unlawful Practice

§ 1. **Jurisdiction.**—The Committee on Unlawful Practice shall have jurisdiction over all matters and questions which may be considered as constituting the unlawful practice of law under the definition of the practice of law adopted by the Supreme Court of Appeals of West Virginia by rule effective May 1, 1947, and any amendments or changes thereto, and in accordance with other applicable principles of law governing and defining the practice of law in this and other jurisdictions.

§ 2. **Powers.**—Such Committee shall investigate, on its own initiative or upon request of any court or judge or upon the verified complaint of any person, any matter involving the alleged unlawful practice of law. Such Committee is empowered to dismiss any complaint, to enter into an agreement to desist from unlawful practices, or, when the facts warrant, to institute appropriate proceedings in the name of The West Virginia State Bar, or in the name of any authorized committee or of any member thereof, in any court having jurisdiction, for the purpose of securing appropriate relief.

Such Committee may act as a committee, or through any sub-committee thereof, or may refer any matter under consideration to any Grievance Committee for investigation.

§ 3. **Members; Terms; Vacancies; Removals.**—The Committee on Unlawful Practice shall consist of seven members, selected by the Board from the active members of the State Bar. When first constituted, three members shall be selected for terms of one year, two for terms of two years, and two for terms of three years. Thereafter, in each year, members shall be selected, each for three-year terms, to fill vacancies occurring in that year by reason of the expiration of the terms of office of members theretofore selected. Vacancies occurring for other reasons shall be filled by the Board for the unexpired terms. If a member of such committee be determined by the Board to have become incapacitated from performing his duties as such member, or be absent from any two consecutive meetings of such committee, without cause deemed adequate by the Board, he may be removed by the Board. The term of office of each member shall commence at the conclusion of the annual meeting designated by the Board in making his appointment.

§ 4. Officers; Sub-Committees.—For such committee a Chairman and a Vice Chairman shall be designated annually by the Board from the members of such committee. Such committee may designate other officers and sub-committees, from its own members, with such of its powers and responsibilities as it may deem proper.

§ 5. Meetings; Quorum.—Such committee shall meet, at any place in the State of West Virginia, upon call of its Chairman or Vice Chairman, or upon call of the President of the State Bar. Upon written request of five Governors the President or Secretary shall call a meeting of such committee.

Three members of such committee shall constitute a quorum.

§ 6. Summons and Subpoena Powers.—In any investigation or hearing under this Article, such committee, any Grievance Committee, any authorized member of either thereof, or any Governor or officer of the State Bar shall have the power, by summons or subpoena issued under the hand of any authorized member of either committee or of any Governor or such officer, to summon and examine witnesses under oath administered by any member of said committees, any Governor or such officer, and to compel their attendance and the production of any and all books, papers, letters and other documents necessary or material to the inquiry.

§ 7. Effect of Summons or Subpoena.—Any such summons or subpoena issued as provided in the preceding section shall have the same force and effect as a summons or subpoena issued by a Circuit Court of the State of West Virginia. If any witness or other person shall fail or refuse to appear, or to be sworn, or to testify, or to produce books, papers, letters or other documents demanded, upon application to a Circuit Court or the Judge thereof within the Congressional District in which any investigation or hearing is being conducted, a rule or an attachment shall be issued against such witness or other person as in cases of contempt.

§ 8. Reports.—Such committee shall report to the Secretary in writing immediately upon initiating any investigation or other action, and shall thereafter report to him from time to time the status thereof, and upon final disposition of any matter shall forward to him a report thereon with the complete file thereof.

ARTICLE VIII

Grievance Committees

§ 1. Duties.—The Grievance Committee in each State Bar District shall investigate within such District all matters within the jurisdictions of the Committee on Legal Ethics and on Unlawful Practice, and shall make report and recommendation thereon to the appropriate com-

mittee and to the Secretary. It shall also perform such other functions and duties in its district as the Board may prescribe from time to time, including, when authorized by the Board, the exercise of all rights, powers and duties of every kind provided for the Committees on Legal Ethics and on Unlawful Practice.

§ 2. **Members.**—Such Grievance Committees shall consist of such number of members, appointed by the Board for such terms, as the Board may from time to time determine. Each such committee shall have a Chairman, selected annually by the Board.

ARTICLE IX

Miscellaneous Provisions

§ 1. **Seal.**—The State Bar shall have a seal having the words and figures "THE WEST VIRGINIA STATE BAR—May 1, 1947" and such other design as the Board may prescribe, for the authentication of its proceedings and records. The courts in this State shall take judicial notice of such seal, and in all cases copies of resolutions, proceedings or records in the office of the State Bar, certified by the Secretary under such seal, shall be equal to the orignal in evidence. The seal shall remain in the custody of the Secretary at the office of the State Bar unless otherwise ordered by the Board.

§ 2. **Service of Process.**—Service of any notice or process upon the State Bar may be had upon the President or Secretary.

§ 3. **Non-Liability of State Bar and Its Members.**—The State Bar, its members, officers, Governors and committees shall not be liable to any member of the State Bar, or to any other person, firm or corporation, for any damage incident to any investigation, complaint, charge, prosecution, proceeding or trial.

§ 4. **Representation.**—Except as in these By-Laws expressly otherwise provided, no Section, committee or member shall assume to represent the State Bar in any court or elsewhere unless authorized to do so by the Board or by the President.

§ 5. **Limitation.**—Except as in these By-Laws expressly otherwise provided, no recommendation or report of a Section, committee, or member shall become the recommendation or report of the State Bar until approved by the Board.

§ 6. **Official Publications.**—The official publication of the State Bar shall be the "West Virginia State Bar News", which shall be published under the supervision and direction of the Board.

§ 7. **Fiscal Year.**—The fiscal year of the State Bar shall begin on July 1 of each year and end on June 30 of the next succeeding calendar year.

§ 8. **Parliamentary Rules.**—The rules contained in "Robert's Rules of Order, Revised" shall govern the proceedings at all meetings of the State Bar and of the Board in all cases to which they are applicable, and in which they are not inconsistent or in conflict with the Constitution of the State Bar, these By-Laws, and the rules and regulations adopted by the Board.

§ 9. **Costs.**—No costs shall be recoverable against the State Bar, its members, officers, Governors, or committees, and it shall be required to pay only such fees, costs and charges incident to any court proceeding as other Departments of the State Governments are required to pay.

§ 10. **Privacy of Record.**—Except to the extent otherwise in these By-Laws expressly provided, no person shall have any right to see or inspect, or to have a copy of, any paper, document or other record relating to any matter at any time before the Committee on Legal Ethics, the Committee on Unlawful Practice, any Grievance Committee, any other committee, the Board of Governors, or in the possession of any officer, except a current member of the committee in question, as to its records, or a Governor or officer of the State Bar, as to any such record.

ARTICLE X

Amendments and Referenda

§ 1. **Amendments at Annual Meeting.**—Subject to the approval of the Supreme Court of Appeals, these By-Laws may be altered or amended at any annual meeting on recommendation of the Board by vote of a majority of the members present or, without such recommendation, by vote of two-thirds of the members present.

§ 2. **Amendments by Mail Vote.**—The Board may at any time submit to the members of the State Bar, by mail, proposed amendments to the Constitution and to the By-Laws of the State Bar, in which event the action of the members shall be as effective as if the vote had been taken at an annual meeting of the State Bar, and a majority of the votes cast shall prevail.

§ 3. **Referenda.**—For the purpose of ascertaining the opinion of the membership, the Board may at any time, and when directed so to do at an annual meeting shall, refer and submit to the membership of the State Bar, defined questions affecting the substance or administration of the law, or affecting the functions or policy of the State Bar.

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JAMES R. BROWNING, Clerk

In the

Supreme Court Of The United States

October Term, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR APPELLEE

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In the

Supreme Court Of The United States

October Term, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (R. 66-81) is reported at 10 Wis. 2d 230, 102 N. W. 2d 404. The opinion and judgment of the trial court (R. 49-64) are not reported.

JURISDICTION

In its order of October 10, 1960 in this case, the Court directed that further consideration of the question of jurisdiction be postponed to the hearing on the merits (R. 85). Accordingly, we address ourselves at the outset to the question of jurisdiction, pursuant to Rule 16 (4) of this Court.

1. A State "Statute" under § 1257 (2) Refers to Legislative Action.

This appeal is taken under 28 U. S. C. § 1257 (2), which permits review of the final judgments of the highest court of a state as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The important word in this subsection, insofar as this case is concerned, is "statute." It is only the review of a *statute* of a state which is authorized.

The reference in § 1257 (2) to a state statute has a well-defined meaning under the cases. It signifies state *legislative* action in some form, but is not limited to laws passed by a legislature. *Williams v. Bruffy*, 96 U. S. 176, 183. Thus, the order of a state department or board may be a statute in the exercise of delegated legislative authority. *Bluefield Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 683; *Lake Erie & W. R. R. Co. v. Pub. Util. Comm.*, 249 U. S. 422, 424. Municipal ordinances also fall within the same category.

King Mfg. Co. v. Augusta, 277 U. S. 100, 102-114; *Jamison v. Texas*, 318 U. S. 413, 414.

The test in these cases is whether the particular action proceeds from the legislative power of the state. It may emanate from delegated legislative authority, as in the case of action by state boards and by municipalities, or from direct enactment by the legislature, or by action creating or amending state constitutional provisions. *King Mfg. Co. v. Augusta, supra*, 103-104. Not every order of a state agency, of course, is a statute within the meaning of § 1257 (2). It must possess legislative characteristics and not be merely fact-finding or informational in nature. *Ex Parte Williams*, 277 U. S. 267, 271-273.

With respect to a state public service commission fixing water rates, this Court said, "The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature." *Bluefield Co. v. Pub. Serv. Comm., supra*, 683. In *King Mfg. v. Augusta, supra*, 102-114, this Court held that the word "statute" for appeal jurisdiction was not limited to acts of a legislature but included municipal ordinances, citing many cases to the effect that such ordinances, like orders of state boards and commissions, were an exercise of legislative power delegated by the state legislature.

In this connection, it should be noted that strong objection was expressed by certain members of the Court to extending appeal jurisdiction to cases involving city ordinances and the orders of state boards and commissions, particularly in view of the legislative history of the appeal

statute. Prior to the act of February 13, 1925, c. 229, 43 Stat. 936, 937, § 237 (a) of the Judicial Code provided for review on writ of error "where is drawn in question the validity of a statute of, *or an authority exercised under* any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity." (Emphasis added) The act of February 13, 1925 struck out the words "or an authority exercised under" any state, leaving the language as in the present § 1257 (2).

To Justices Brandeis and Holmes this change indicated a restriction of jurisdiction to statutes enacted by a state legislative body, especially in view of the well-known purpose at the time to reduce the volume of cases coming before the Court on appeal. Accordingly, they dissented vigorously in *King Mfg. Co. v. Augusta, supra,* at 115, protesting against stretching the words "statute of any state" to cover municipal ordinances.[1] They also dissented in *Sultan Ry. Co. v. Dept. of Labor,* 277 U. S. 135, 137, where the order of a state bureau was held to be a state statute.

Thus, the meaning of "statute of any state" has embraced legislative action of varying kinds and not simply acts adopted by a legislature; but the term has never been held to apply to judicial acts.

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[1] "I cannot believe that if Congress had intended to maintain our jurisdiction to review judgments sustaining such ordinances on writ of error, it would not have found clearer language in which to express its purpose," said Mr. Justice Brandeis (p. 116).

2. The Orders Drawn in Question in this Case are not a "Statute" under § 1257 (2) because they Constitute Judicial and not Legislative Action.

In the instant case we are not dealing with *legislative* action of any kind or form. Appellant challenges the orders or rules of the Wisconsin Supreme Court integrating the bar and states in his brief (p. 3) that § 1257 (2) is applicable "unless it can be said that said rules do not constitute a statute."

Such orders or rules do not constitute a statute, it is submitted, because they are judicial in nature and emanate from the judicial power of the state. They constitute *judicial* action by the Wisconsin Supreme Court in the exercise of its inherent authority over the practice of law. *In re Integration of Bar*, 273 Wis. 281, 283, 77 N. W. 2d 602, 603 (involving the first order of integration); *In re Integration of Bar*, 5 Wis. 2d 618, 622, 624-625, 93 N. W. 2d 601, 603, 604-605 (ordering integration continued on a permanent basis).

The issue whether integration was a matter for legislative or judicial action was raised squarely in the first of four integration cases. *Integration of Bar Case*, 244 Wis. 8, 36-54, 11 N. W. 2d 604, 617-625. The 1943 legislature passed a statute providing for integration of the bar and for implementation by orders of the Wisconsin Supreme Court,[*] reading as follows:

"256.31 State Bar of Wisconsin. (1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this

[*]The act, c. 315, Laws of 1943, became Sec. 256.31, Wis. Stats.

state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.

"(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

The court reviewed the history of integration efforts in Wisconsin, decided that § 256.31 was enacted validly and did not violate the Fourteenth Amendment to the Federal Constitution, and then turned to the issue of whether bar integration involves a legislative or judicial power. It acknowledged that the legislature had the power to impose minimum qualifications for attorneys in the exercise of the police power, but stated that the ultimate responsibility over the bar rested with the judicial department. With respect to integration, it said that the power to integrate the bar is an incident to the exercise of the judicial power vested by the constitution in the courts, and that "it has been held by every court to which the question has been presented that the court has power to integrate the bar and that the integration of the bar is a judicial and not a legislative function," citing many cases. 244 Wis. 8, 40-41, 11 N. W. 2d 604, 619.

It discussed the effect of the statute passed by the legislature with much tact, concluding that it was a legislative declaration that bar integration would promote the general welfare and not "an attempt by the legislature to

invade the province of the court or to dictate to it." 244 Wis. 8, 52-53, 11 N. W. 2d 604, 624. Despite such declaration of the legislature, however, the court declined to order integration because so many attorneys were then in the military service. 244 Wis. 8, 54-55, 11 N. W. 2d 604, 624-625.

In the second integration case the court again referred to § 256.31 as a legislative declaration but again declined to follow it and order integration, for reasons which it repudiated later. At the same time it made clear that it did have the inherent or implied judicial power to order integration if the exigencies called for it. *In re Integration of Bar*, 249 Wis. 523, 527-528, 25 N. W. 2d 500, 502.

In 1956 the court concluded to order integration for a trial period. *In re Integration of Bar*, 273 Wis. 281, 77 N. W. 2d 602. Rules were adopted by order of the court, effective January 1, 1957, bringing the State Bar into existence and declaring (§ 1, Rule 1) that they "are adopted in exercise of the court's inherent authority over members of the legal profession as officers of the court" (R. 7).

After two years of integration the Wisconsin Supreme Court, in the fourth integration case, ordered the State Bar to be continued because it had functioned so successfully. Again it asserted its inherent power over the bar, not only for creating and continuing the State Bar but also for taking remedial action if any activities should be engaged in which might be out of harmony with integration objectives or otherwise contrary to the public interest. *In re Integration of Bar*, 5 Wis. 2d 618, 624-625, 93 N. W. 2d 601, 604-605.

Thus, it is quite plain from the above cases that the action in Wisconsin integrating the bar was judicial and

not legislative in character. Other courts have also held that integration is a judicial function based upon inherent power. *Petition of Florida State Bar Ass'n.*, 40 S. 2d 902, 905-906; *Petition for Integration of Bar of Minn.*, 216 Minn. 195, 198-200, 12 N. W. 2d 515, 517-518; *In re Integration of Nebraska State Bar Ass'n.*, 133 Neb. 283, 286-289, 275 N. W. 265, 266-268; *In re Integration of State Bar of Oklahoma*, 185 Okla. 505, 506-507, 95 P. 2d 113, 114-116. In fact, the more recent trend has been to accomplish integration solely by order of the court under its inherent judicial power with respect to the practice of law.[3]

3. Appellant Ignores the Distinction between Legislative and Judicial Acts and Seeks to Extend § 1257 (2) to all Actions of a State.

Appellant concedes that § 1257 (2) refers only to the exercise of legislative authority, but his argument is that anything which has the effect of law is legislative in character. He conjures up the phrase, "rule making power of a state," and simply states that it encompasses acts of the legislature as well as the courts, and thus there is really no difference between them.[4]

He ignores the fundamental constitutional concept of the division of governmental powers. The Wisconsin Constitution, Art IV, § 1, declares that "The legislative power shall be vested in a senate and assembly." Similarly, Art

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[3]As in the case of Florida, Missouri, Nebraska, Oklahoma, the Virgin Islands, and Wisconsin. The older integrated bars were established by state statute or by a combination of statute and court rules, without attempt to question the basic authority for so doing. See Winters, **Bar Association Organization and Activities**, 9-11 (1954).

[4]Appellant's Brief, 4-5.

VII, § 2, provides that "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuits courts, courts of probate, and in justices of the peace." The separation of powers is fundamental to our whole political system, but appellant would obliterate the distinction between judicial and legislative authority with reference to § 1257 (2).

None of the cases he cites with respect to § 1257 (2) deals with judicial acts. All have to do with legislative action in one form or another. The kinds of legislative acts within the purview of the appeal statute are well summed up in the following language (part of which is quoted by appellant on page 6 of his brief as authority for his position) of *King Mfg. Co. v. Augusta*, 277 U. S. 100, 103-104:

> "It of course rests with each State to determine in what form and by what agencies its legislative power may be exerted. *It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions.* But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the State; they express its will and have no force otherwise." (Emphasis added)

Appellant also refers to *Hamilton v. University of California*, 293 U. S. 245. That case involved both an act of the California legislature and an order pursuant thereto

issued by the Board of Regents, a state agency with delegated legislative authority.

The appellant would have this Court go a long step beyond previous cases and hold that the integration orders of the Wisconsin Supreme Court are state *statutes*. True, they have the effect of law, but that may be said generally of all judicial action. Every order, decree, and judgment of a court has the force of law. When a legal principle is laid down by a court or an old one changed, it has status and authority similar to an act of the legislature. A common law rule may be over-turned or modified, with widespread results and the full force of law. That is not to say, however, that the court is exercising a legislative function, even when it is construing a state statute.

A contention similar to appellant's has been made with respect to the provision in Art. I, § 10, of the United States Constitution that "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ." It has been argued that this embraces judicial as well as legislative acts. However, this contention has been rejected, and it is well-settled that the prohibition is directed only against impairment by legislation and not by judicial action. *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451; *Barrows v. Jackson*, 346 U. S. 249, 260.

In view of the legislative history of § 1257 (2), the cases holding that "statute of any state" means legislative action of some kind, and the traditional distinction between legislative and judicial functions, we submit it would pervert the intent of Congress to construe the appeal statute as including judicial action.

4. Certiorari Should not be Granted.

This Court can, of course, consider the appeal papers as certiorari under § 2103. However, we submit that certiorari should not be granted because there is no substantial question as to the constitutionality of the State Bar of Wisconsin, for the reasons stated in our brief on our motion to dismiss (11-28) and as will be demonstrated in the argument of this brief. The decision of this Court in *Railway Employes' Dept. v. Hanson*, 351 U. S. 225 on the all-union shop and the unanimity of the many cases in state courts on the constitutionality of bar integration, it seems to us, remove the issue from the realm of doubt.

In addition, appellant challenges certain activities of the State Bar as to which the record is bare and fragmentary with respect to his contentions, and as to which he has an adequate remedy in the state court. This is discussed in subsequent portions of this brief (*infra*, pp. 48, 65-69).

QUESTION PRESENTED

Whether the orders or rules of the Wisconsin Supreme Court integrating the bar of that state violate the Fourteenth Amendment to the Federal Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the Constitution of the United States, which is pertinent in connection with the Fourteenth Amendment, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of the Wisconsin Supreme Court entered on April 5, 1960 (R. 65-66), holding that the orders or rules of that court integrating the bar of the state are constitutional, and affirming the judgment of the circuit court entered on October 23, 1959, which dismissed appellant's complaint.

In 1956, upon petition of members of the bar and after a hearing, the Wisconsin Supreme Court decided to integrate the bar for a trial period of two years (R. 2-3), under its inherent authority over attorneys as officers of the court. *In re Integration of the Bar*, 273 Wis. 281, 285, 77 N. W. 2d 602, 604. In accordance with that decision and after a further hearing, the court entered an order on December

7, 1956, (273 Wis. p. vii, with an accompanying opinion at 273 Wis. p. viii, 79 N. W. 2d 441) promulgating rules and by-laws for the State Bar of Wisconsin (R. 7-40).

The purposes of the State Bar are set forth in Rule 1, § 2 (R. 8) as follows:

> "The purposes of the association shall be to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged."

The rules and by-laws require enrollment in the State Bar and the payment of annual dues by every attorney licensed or admitted to practice law (R. 8-10, 27-29). The membership consists of active members and inactive members, and only the former can practice law and can vote in bar elections. Inactive members are those who are eligible for active membership but are not engaged in the practice and request enrollment in the inactive class. Judges of courts of record not engaged in the practice of law are inactive members (R. 9). If the annual dues of a member are not paid, the member is subject to suspension and during suspension he may not practice law (R. 10, 29).

The officers are elected annually by the members by mail ballot (R. 10-12, 30-31). The affairs of the State Bar are managed by a board of governors consisting of the officers and the immediate past-president and 29 members elected from 9 districts of the state by mail ballot. The term of each governor is two years, and no governor may be elected for more than two consecutive terms (R. 12-14, 31-33).

Provision is made for meetings of the board (R. 14, 33-34), the executive committee (R. 16-17), and of the members (R. 17-18). A referendum procedure is established for submitting matters to the members for determination by mail ballot, which can be initiated in several different ways (R. 18-19).

Provision is also made for various standing committees dealing with legal education and bar admissions, post-graduate eduction, the administration of justice, the study of judicial selection, tenure, and compensation, professional ethics, public services, inter-professional and business relations, grievances, legislation, legal aid for the indigent, the unauthorized practice of law, the State Bar Bulletin, and other publications (R. 14-16, 34-37). In addition, sections are established dealing with specific fields of law (R. 15-16, 37-39).

Extensive machinery is set up for the handling of grievance complaints, petitions for reinstating disbarred or suspended attorneys, and other matters by district grievance committees (R. 20-25), but the power to suspend or disbar remains with the Supreme Court. Complaints found to warrant disciplinary action are forwarded to the State Bar Commissioners for further proceedings (R. 21-22), and

findings and recommendations with respect to reinstatement of suspended or disbarred lawyers, together with the recommendations of the board of governors, are forwarded to the Wisconsin Supreme Court (R. 23).

Appellant seeks to give the impression by use of the word "substantially" that the services and activities of the State Bar are the same as the prior voluntary bar (Appellant's Brief 9, 17). The court below took pains to point out some of the differences, such as in the fields of legislative activity (R. 73), unauthorized practice (R. 79), and grievance investigations (R. 81).

At the end of the two-year trial period of integration a further hearing was held by the Wisconsin Supreme Court. It found that integration had proved successful and none of the fears of objectors had materialized, and on December 22, 1958 ordered it continued on a permanent basis (R. 40-47). *In re Integration of the Bar*, 5 Wis. 2d 618, 621, 93 N. W. 601, 602-603.

Appellant enrolled in the State Bar and paid his annual dues of $15.00 in 1957 and 1958 (R. 3). The following year, however, he paid his dues under protest (R. 6), and on June 8, 1959 commenced this action in the circuit court to recover them from the appellee, then the treasurer of the State Bar (R. 1). The complaint (R. 1-48) is replete with generalizations, but its gravamen seems to be that the State Bar engages in legislative activities, and compulsory membership in it is unconstitutional (R. 5-7).

The appellee (defendant) demurred to the complaint upon three grounds, namely, (1) that the circuit court lacked jurisdiction over the subject matter of the action

because exclusive jurisdiction is vested in the Wisconsin Supreme Court, (2) that there was a defect of parties defendant in that the State Bar is a necessary party, and (3) that the complaint did not state a cause of action in any event (R. 49). The circuit court sustained all three grounds of demurrer and dismissed the complaint (R. 49-64). It expressly held that integration did not violate any provision of the United States or Wisconsin Constitutions (R. 61-63).

Appellant then appealed to the Supreme Court of Wisconsin which affirmed the judgment of the circuit court. Although it agreed that the lower court did not have jurisdiction, the Supreme Court decided the constitutional issue as if the action had been started originally and properly in its court (R. 68, 77), but at the same time ordered that the judgment of the trial court be affirmed (R. 77).

The Wisconsin Supreme Court in its decision held:

1. That the rules and by-laws of the State Bar do not compel appellant to associate with anyone or restrict his freedoms in any way (R. 70).

2. That the "right" to practice law is not a right but a privilege subject to regulation within constitutional limits (R. 71).

3. That the annual dues of members of the State Bar are in the same class as an annual license fee imposed upon any occupation or profession which is subject to state regulation (R. 71).

4. That the legislative activities of the State Bar are limited by the rules and by-laws adopted by the court; that the court has examined all of such activities since integration and takes judicial notice that in every

instance the legislative measures supported or opposed by the State Bar dealt only with the administration of justice, court reform, and legal practice; and that it is in the public interest for the profession to give its composite judgment on measures in these fields, a function which can be performed much more effectively by an integrated bar than a voluntary bar association (R. 71-74).

5. That the State Bar is a public agency, and insofar as constitutionality is concerned, there is no distinction between the advocacy of legislation by it and by the State Judicial Council, which is supported by tax revenues (R. 75-76).

6. That integration is a form of regulation by the court in the exercise of its inherent authority over the profession; that such regulation does not infringe upon appellant's freedoms; and that the annual license fee is but a slight inconvenience far outweighed by the public interest served (R. 74-75).

7. That experience with integration in various states since 1921 shows there is no ground for appellant's fears that integration will lead to syndicalism *(sic)* (R. 77).

8. Therefore, the integration orders violate none of the First Amendment freedoms embodied in the due-process and equal-protection clauses of the Fourteenth Amendment (R. 77).

The court also attached to its opinion an appendix analyzing a number of the activities of the State Bar and the public purposes served thereby (R. 77-81).

Appellant appealed to this Court (R. 82-84) and filed his jurisdictional statement. Appellee moved to dismiss. On October 10, 1960 the Court ordered that further considera-

tion of the question of jurisdiction be postponed to th. hearing on the merits (R. 85).

SUMMARY OF ARGUMENT

I.

Examining the history of the integrated bar, we see that it is not a new or radical idea. It comes to us from England, where the ancient Inns of Court developed because of the need to provide training for the profession and maintain discipline. The courts felt that more effective regulation could be exercised by an organized profession in the form of the Inns and long ago delegated such power to them. Today no barrister may practice without being a member of one of the four Inns, and they decide who shall be admitted and have power to suspend or disbar. The other branch of the profession, the solicitors, is governed by The Law Society, which regulates the training and admission of the solicitor and may remove, suspend, or fine him. Both the Inns and the Society have powers and duties with respect to the profession, especially as to admission and discipline, far beyond those of any bar organization in this country. They are responsible for the excellent standards and traditions of the profession in England today.

Every province in Canada also has an integrated bar modelled after the English system. In fact, the Canadian organization so impressed Harley of the American Judicature Society that in 1914 he embarked upon a crusade for the integrated bar in this country. Spurred on by the difficulties and ineffectiveness of voluntary associations, the

idea caught fire and leading figures of the profession rallied to the cause. In 1921 North Dakota became the first state to have an integrated bar. Today there are integrated bars in 27 states, Puerto Rico and the Virgin Islands, and Dean Pound states that the ultimate high point of the profession will be gained when all the states are integrated. Integration has stood the test of experience, for no integrated bar state has gone back to the voluntary association.

II.

The practice of law is a profession inextricably bound up with the administration of justice. Accordingly, those who practice are officers of the court subject to regulation and discipline to safeguard the public interest in the judicial process. The practice has generally been held by the courts to be a privilege burdened with conditions and not open to all as a matter of vested or constitutional right. The profession must comply strictly with qualifications, standards, and conditions, which may be laid down by the legislature as minimum requirements, but as to which the ultimate power of regulation rests with the judiciary. It is well-settled that such power is an inherent one of the courts, to protect themselves and hence the public in the administration of justice. Such regulation, however, must not be arbitrary, capricious, or discriminatory, but must be reasonable and just, in conformity with the Fourteenth Amendment.

III.

Integration is a reasonable means of regulating the profession under the Fourteenth Amendment.

The State Bar is a public agency, established by the court to aid in its judicial functions and subject to its supervisory control. It quite obviously is not a political party, as appellant claims. He is not asked to belong to a private organization but a governmental body created for a public purpose.

Moreover, the integrated bar is a representative, democratic, and self-governing organization. It includes and represents all members of the bar, regardless of race, color, creed, or class. Other professions are regulated by state boards, and the members of the professions have little or nothing to say about the functioning of such boards and appointments to them. The State Bar, on the other hand, operates under a democratic process whereby the members elect their own officers and board of directors, can initiate direct action, and can participate in the work of the bar. The rights of minorities are fully protected, and arbitrary action can always be prevented by the court under its supervisory power.

The very fact that bar integration requires all members to belong and pay dues is a badge of its fairness. It is only reasonable that all should contribute toward the costs of policing and improving their profession, rather than to leave it to the volition of each lawyer, so that some will bear their share and others will escape. Such dues fall in the same category as annual license fees imposed upon other callings

which are subject to state regulation, and their validity has been sustained in many cases.

In addition, the integrated bar can render greater and more effective service than the voluntary bar because it has the financial resources to do so and because it stimulates broader interest and participation in its activities by the profession. Experience with integration in Wisconsin since 1957 has demonstrated increased services to the profession and the public.

Finally, integration fixes responsibility upon the whole profession and enables it to act with respect to the entire bar. Better results are obtained in dealing with common problems and enforcing the rules of professional conduct when there is an organization to which all belong who are affected thereby.

IV.

Appellant's First Amendment rights are not impaired because he is required to "belong" to the State Bar in order to practice law. His freedom as an attorney is not limited any more now than before integration. In order to practice, he had to be admitted to the bar and remain a member in good standing. He became an officer of the court and accepted the conditions and restraints which go with the prerogatives. They apply to him now as much as they did before the bar was integrated. The bar to which appellant was required to belong before integration is the same as the bar to which he now belongs, except that now it is fully organized and better able to function. Appellant is

not compelled by integration to associate with anyone. He is as free as he pleases to attend meetings of the bar, vote in its elections, or participate in bar activities. In addition, he has the full freedom to be heard and to express his views, in support or opposition to those of other members.

In any event, the issue of First Amendment rights in this case, and freedom of association in particular, was settled by *Railway Employes' Dept. v. Hanson*, 351 U. S. 225. The Court found that the record presented no infringement of such rights by a union shop agreement under the Railway Labor Act,—in fact, no more than in the case of the integrated bar. Regardless of the dictum about the integrated bar, the principle of *Hanson* is just as applicable to the all-inclusive bar as to the all-inclusive union. There was no need for the Court in *Hanson* to balance any competing interests or to find a compelling interest because there was no problem of First Amendment freedoms on the record and the only issue was one of lawful regulation of labor relations under the Commerce Clause. The only issue in the instant case is one of reasonable regulation, too, although there is a compelling interest in the state in integrating the bar in order to improve the profession and the administration of justice. This is a public objective as legitimate and important as maintaining industrial peace.

Appellant objects to the legislative activities of the State Bar as violating his freedom of speech, but the record discloses no infringement. These activities are limited by the rules and by-laws of the bar which the court promulgated. The court below examined and took judicial notice of all such activities since the bar was integrated and found that in each instance the measure advocated or opposed

dealt only with the administration of justice, court reform, or legal practice,—all within the restricted scope of the rules and by-laws. Such activities are technical, non-partisan, and non-political in character, and serve a public purpose. The State Bar supports no candidates and takes no position on legislation of an ideological nature. In addition, any member of the bar is free to express his views on legislative or other matters at any time. Other public agencies also take positions on legislative proposals, but no citizen can object and refuse to pay his taxes on that account.

Appellant has no constitutional right of silence in the sense that he can prevent the majority from speaking because he may disagree with its views and prefer not to express his disagreement. Such right claimed by the appellant would compel the group to remain silent in order that the minority need not dissent, which would turn the shield of the First Amendment into a sword. Minority rights are entitled to protection but not by destroying the rights of the majority.

V.

The validity of the integrated bar under the Federal Constitution has been upheld in every case in which the issue has been raised. There is a multitude of authorities in the state courts sustaining validity in general and compulsory membership and license fees in particular. Not a single case can be found which holds that integration violates the Federal Constitution.

ARGUMENT

I.

THE HISTORY AND DEVELOPMENT OF THE INTEGRATED BAR

An understanding of the Anglo-American development of the integrated bar is helpful, we believe, to a consideration of the constitutional issue involved in this case. The historical background gives an insight into the reasons and forces behind the integration movement.

A. *In England*

The integrated bar is an evolutionary outgrowth of the historic power to regulate the legal profession in order to maintain high standards and facilitate the administration of justice. As did so many of our legal concepts and institutions, it descended to us from our English ancestors.

Law as a profession in our Anglo-Saxon legal system goes back to medieval days. By the end of the Middle Ages the profession in England had developed into three categories, which have endured: (1) the judges and serjeants; (2) the apprentices (later known as barristers), organized in the four Inns of Court and the Inns of Chancery, and (3) the attorneys.[1]

The exact origin of the Inns is not known, and there are few records of them in the fourteenth century.[2] In ad-

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[1]Pound, The Lawer from Antiquity to Modern Times, 11, 82 (1953).

[2]2 Holdsworth's History of the English Law, 494-495 (1924); Barton, The Story of Our Inns of Court, 25-26 (1928).

dition to the four Inns of Court there were nine or ten lesser Inns of Chancery which were attached to the other Inns.[7] Dean Pound tells us that the Inns of Court go back almost to the beginning of the common law, and that "the English lawyers at the end of the Middle Ages had become a well developed, well organized profession, maintaining a system of societies or associations promoting a professional tradition, providing adequate training of those who were to enter the profession, and actively furthering the development of the law."[8]

In the ensuing years the Inns grew in importance and authority. Their main functions were to provide training or education for the profession and have charge of the admission and discipline of their members.[9] These same duties or activities are carried on today, except that now the actual technical education of the student is given by a university or by lecturers appointed by the Council of Legal Education, a body formed by the various Inns and their Bar Council.[10] As to barristers, the judges long ago delegated to the Inns their power of admitting persons to practice in the courts. If the Benchers of an Inn "called" a person to the bar, he was received and accepted as a practitioner by the courts. Likewise, the barrister was directly under the control of his Inn with respect to discipline. He could be disbarred by his Benchers or the judges, but the judges seldom acted.[11]

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[7] Pound, **op. cit., supra,** note 5, at 87-88.

[8] Ibid, 93.

[9] Ibid, 87-92.

[10] Bass, **The Organization of the Bar in England: A Sidelight on English Law,** 35 Am. Bar Ass. Jour. 995 (1949).

[11] Pound, **op. cit., supra,** note 5, at 99-100; Lund, **The Legal Profession in England and Wales,** 35 Jour. Am. Jud. Soc. 134, 135-136 (1952).

The strictness with which barristers have been regulated in England from early days was discussed at some length by Chief Judge Cardozo in *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 472-473, 162 N. E. 487, 490, where he said:

> ". . . He (the barrister) was called to the bar upon the nomination of the inns of court, whose members exercised that power as the delegates of the judges. . . . If a barrister was suspected of misconduct, the benchers of his inn might inquire of his behavior. We can hardly doubt that refusal to answer would have been followed by expulsion. There was thus little occasion for controversies as to discipline to be brought before the judges, unless the benchers failed in the performance of their duties. In case they did fail, a supervisory power was ever in reserve. The inns, being unincorporated associations, were not subject to mandamus. . . . They were subject, however, to visitation by the judges. . . . What the court could not do by the instrument of a writ, the judges did by orders in their capacity as visitors. They were not diffident or chary in announcing their pleasure or displeasure. Dugdale's Origines Juridiciales contains a record of the orders of the judges in the exercise of their control over members of the inns. The conduct of the barristers was regulated with minute particularity, even in matters so personal as the growth of their beards or the cut of their dress."

Today no person may be a member of the English bar, practicing as a barrister or advocate, without becoming a member of one of the four Inns. The Inns still decide who shall be admitted or called to the bar and maintain

tight disciplinary control over their members, including the right to suspend or even disbar them from practice.[12]

In addition to various fees as a student, the barrister must pay substantial fees and dues when called to the bar, which constitute a life-time payment. He remains a member of his Inn for life or during good behavior. If he is expelled from his Inn, he cannot gain admission to any of the others. Moreover, he is no longer given an audience in the courts.[13]

The solicitors or attorneys constitute the other branch of the profession in England. They had been excluded for some time from the Inns of Court, as to which Holdsworth says:

> "This exclusion of practising attorneys from the Inns of Court was not beneficial either to the attorneys or to their clients. It was not beneficial to the attorneys, because it deprived them of the benefit of a professional organization which could safeguard their interests. It was not beneficial to their clients, because the clients were deprived of the safeguard which the discipline of a professional organization gives. The attorneys were no doubt individually amenable to the discipline of the courts to which they were attached; but this was a much less effective form of discipline than that which an organized profession can apply. It was found to be difficult to apply the discipline of the courts to scattered individuals with no registered address."[14]

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[12]Lund. **op. cit., supra,** note 11, at 136.

[13]Burdick, Bench and Bar of Other Lands, 220-222 (1939).

[14]6 Holdsworth, **op. cit., supra,** note 6, at 442-443. The Wisconsin Court, in ordering integration of the bar in 1956, also gave as one of its reasons the need for maintaining a registry of all lawyers. **In re Integration of Bar,** 273 Wis. 281, 284-285, 77 N. W. 2d 602, 604.

As a result, the courts issued orders requiring all attorneys to become members of an Inn of Court or Chancery, but the Inns of Court refused to admit them and the Inns of Chancery were in a decadent state.[16] Left without a professional organization, the attorneys in the eighteenth century formed a "Society of Gentlemen Practisers in the Courts of Law and Equity," and in the following century The Law Society of today was established.[17]

The present Law Society is an organization of extensive authority and control over its branch of the profession. While membership in the Society is said to be "voluntary," parliament has given it powers and duties with respect to solicitors far beyond those of any integrated bar in this country. It regulates the examination, training, and admission of the solicitor, and it has full authority to strike him from the roll, suspend him from practice, and to fine him up to 500 pounds together with costs. Moreover, he may not practice unless he is issued a license by the Society each year, for which a small fee is paid. He is also compelled to contribute annually to the Society's "Compensation Fund," which is in the nature of a security fund for clients.[18]

Today no lawyer in England would have the temerity to challenge the authority of the Inns or The Law Society to regulate his professional life. "These restrictive rules are accepted cheerfully by the legal profession in England, because it is realized that in this way, and in this way

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[16] 6 Holdsworth, **op. cit., supra,** note 6, at 443. Orders to such effect were issued in 1633, 1654, 1667, 1684, and 1704.

[17] Ibid; 443; Wickser, **Bar Associations,** 15 Cornell Law Quar. 390, 392-393 (1930).

[18] Lund, **op. cit., supra,** note 11, at 139-141.

only, can the absolute integrity of the English Bar be upheld, and in this way only can the Bar be worthy of the high trust placed in it by the lay public in England."[14]

B. *In Canada*

It was natural, of course, that the idea of an integrated bar should spread to Canada from its mother country. In Canada, however, the distinction between barrister and solicitor is disappearing.

In 1797 the lawyers of Upper Canada (the present province of Ontario) were authorized by statute to form a Law Society. It was incorporated in 1822 and is the organization for all lawyers in the province, occupying approximately the same position as the Inns of Court in England. A similar organization now exists in every other Canadian province.[15]

Every lawyer is required to belong and pay annual dues in order to practice. The functions of the Society in each province include the supervision of legal education, the examination of those seeking admission to the bar, and suspension or disbarment, subject to court review. The Society is governed by a representative board, called Benchers, who are elected by the members.[16]

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[14]Bass, **op. cit., supra,** note 10, at 997.

[15]Winters, Bar Association Organization and Activities, 4-5 (1954); Adams, **The Self-Governing Bar,** 26 Am. Pol. Sci. Rev. 470, 470-471 (1932).

[16]Gordon, **The Organization of the Canadian Bar,** 4 Ore. L. Rev. 200, 200-201 (1925).

As will be seen, the progress made by the all-inclusive bar in Canada was so impressive that the idea of integration finally took root in the United States.

C. *In the United States*

Thus we find, as Dean William Wicker of the Tennessee College of Law points out, that "The English bar has been integrated for centuries and the bars in all of the provinces of Canada are integrated."[21] There was nothing new or radical about integration when the movement started in this country. It was a pillar of the English legal system, giving strength and character to the entire profession. When integration found acceptance in the United States, however, it was in a form with less power but more democracy than the organized bar of England.

The acceptance of the common law and the development of a legal profession were well begun in this country at the time of the Revolution, but a reaction set in after that. There were many reasons for this, including the post-revolutionary economic depression which gave rise to dissatisfaction with law and a dislike for lawyers, political conditions which created enmity toward England and its legal system, social conditions which brought a levelling process and a disbelief in professions in general, and geographical conditions which tended to decentralize the administration of justice and so of the bar.[22] Statutes frequently were enacted which threw the practice of law open to all. In some states, including New Hampshire, Maine,

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[21] Wicker, **Integrated Bars**, 21 Tenn. L. Rev. 708, 709 (1951).

[22] Pound, **op. cit., supra**, note 5, at 177-183.

Wisconsin, and Indiana, all educational requirements were abolished."[22]

With the coming of Jacksonian democracy, badges of social distinction were cast aside. Everyone was entitled to engage in any calling or profesesion, as a natural right or otherwise. The influence of the frontier was a decisive factor in such thinking because "A pioneer society does not believe in specialists nor in an organized profession of lawyers. The pioneer feels himself equal to anything and prefers to believe that he can prosecute, defend, and judge his own law suits."[24]

Pound speaks of the period from 1836 to 1870 as the "era of decadence" of the legal profession. "The high point at the beginning," he says, "is on the eve of the Revolution. The lowest point is immediately after the Civil War. The rise begins with the present-day type of bar association in 1870 or certainly in 1878, and the high point has been regaining since 1921 and is attained once more in the integrated bar in half of the states."[25]

In 1914 Herbert Harley, founder and secretary of the American Judicature Society, visited Toronto in the Canadian province of Ontario, and was so impressed with the organization of the bar that he determined to promote integration in the United States.[26] In an historic address at

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[22]Wickser, **op. cit., supra,** note 16, at 392; Pound, **op. cit., supra,** note 5, at 229-231.

[24]Pound, Speech at Brooklyn Law School, Nov. 10, 1928.

[25]Pound, **op. cit., supra,** note 5, at 223.

[26]Winters, **Integration of the Bar—You Can't Lose,** 39 Jour. Am. Jud. Soc. 140, 141 (1956).

Lincoln, Nebraska that same year he urged an all-inclusive bar as a means to reform and improve the profession.[27]

The idea caught fire and was discussed and debated at many bar association meetings. In 1918 the American Judicature Society published a proposed integrated bar act with extensive powers over admission, discipline, and disbarment.[28] The next year the Conference of Bar Association Delegates of the American Bar Association appointed a committee on state bar organization, headed by Judge Clarence N. Goodwin. It submitted a report to the Conference in 1920 in St. Louis in which it recommended the creation of state integrated bars. It found that the voluntary associations had done some fine work but were inadequate for the task of elevating the profession. It pointed out that members of the supreme court bar of a state have definite legal status as a part of the machinery of state government and constitute a body politic; that they are the advising and moving officers of the court, just as the members of the bench are its deciding and decreeing officers; that a lawyer's responsibilities before the court are similar to those of a government official and not of a private citizen; and hence that the entire bar of a state should be organized and should function in legal recognition of the fact that it is a body politic and an integral part of the judicial department.[29] It said:

> ". . . No legal difficulty in the way of such an organization has occurred to the committee, and it believes that no practical legal difficulty exists.

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[27]Harley, **A Lawyer's Trust**, 7 Neb. State Bar Ass. Proc. 143, reprinted in 29 Jour. Am. Jud. Soc. 50 (1945).

[28]2 Jour. Am. Jud. Soc. 111 (1918).

[29]4 Jour. Am. Jud. Soc. 83 (1920).

"We call attention of the conference to the fact that this is the only civilized nation in the world in which the judicial bar is not a self-governing, responsible body politic, and it is likewise the only civilized nation in which the title of a lawyer does not carry with it a guarantee of professional integrity and responsibility."[20]

Speaking from his own experience, Judge Goodwin of Chicago said:

"How has the bar been governed in the past? It is said that it has been governed by courts, but this is true only in a most restricted sense. It has been my privilege to sit upon the bench both in the trial and appellate courts and I know how impossible it is for those in that isolated position to exert any practical control over the actions of the thousands who constitute the bar. Naturally the only effective action courts are able to take is upon information submitted to them, usually by the voluntary bar associations, and if we are frank with ourselves, we must admit that such efforts at bar government have been in the greater part a failure."[21]

The movement for the integrated bar in the 1920's was supported by such leading figures of the legal world as Charles Evans Hughes, Elihu Root, John W. Davis, Dean Wigmore,[22] Arthur T. Vanderbilt,[23] Robert H. Jackson,[24] and

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[20]Ibid. 85.

[21]Address to New York State Bar Association. Jan. 20, 1922; reprinted in 5 Jour. Am. Jud. Soc. 181, 183 (1922).

[22]Cohen, **The National Call for the Organization of An All Inclusive Bar,** 4 N. Y. L. Rev. 80, 82, 83 and continued at 135, 136 (1926).

[23]Vanderbilt, **What Is Bar Integration,** 60 N. J. L. Jour. 397 (1937).

[24]Jackson, **Compulsory Incorporation of the Bar from the Country Lawyer's Viewpoint,** 4 N. Y. L. Rev., 316 (1926).

others. Hughes took an active role in the debate over integration in New York as provided in the Gibbs Bill, which was finally defeated. At a meeting of the New York State Bar Association in 1926 he supported the proposal vigorously, saying:

> ". . . I should like to see the entire bar brought within the influence of the men who are now laboring under difficulties in the organizations to which the great number of our bar feel they are entirely unrelated. They are on the outside, and we need in this day of great numbers the most effective organization that we can get. Anybody who is admitted to the bar receives a privilege on condition. I have no doubt that one of those conditions can be that he shall become a responsible member of an organization of this sort. The state can certainly, it seems to me, impose that condition upon his being admitted to the privileges of practice. Bring him into this range of conscious responsibility. Have him understand that he is not simply amenable to discipline by some organization to which he has no relation, but that he is a part of the bar maintaining these standards which control his conduct."[34]

One of the objections to the proposal in New York stemmed from the fear that an all-inclusive bar would permit the influx of undesirable elements, particularly from the large masses of immigrants in New York City.[35] Similar opposition was voiced in the South with respect to Negro lawyers.[36] In answer to the fear expressed in

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[34]See Goodwin, **Elihu Root and Charles Evans Hughes Were Early Leaders of the Movement for Integration of the Bar,** 34 Jour. Am. Jud. Soc. 149, 150 (1951).

[35]Wickser, **op. cit., supra,** note 16, at 405-407; Guthrie, **The Proposed Compulsory Incorporation of the Bar,** 4 N. Y. L. Rev. 223, 232-233 (1926).

[36]See Wicker, **The Pros and Cons of An Integrated Bar,** 23 Tenn. L. Rev. 457, 459 (1954).

New York, Hughes said, "Instead of that being a reason to be urged in opposition to this plan of the organization of the entire bar, it seems to me to be a fundamental ground for urging that organization."[32]

Robert H. Jackson had deep convictions on the issue which he expressed at a bar meeting at Buffalo, New York, in 1926. He decried the ineffectiveness of the voluntary bar associations and attacked the Gibbs Bill as too impotent, ridiculing the $3.00 membership dues as absurdly low. "I would favor a movement in the direction of the British system—without, however, entertaining any wish that the evolution in that direction be unduly forced or any delusion that even an approximation of their excellent system can, under American conditions, be accomplished," he said.[33] For the present he urged awaiting the development of sentiment among the bar and public "that will sustain the creation of a real bar association, all inclusive in membership, self-governing in character, with substantial power to exercise and duties to perform and functioning upon a system that will represent every element of our ancient and well-loved profession."[34]

While New York argued and debated, other states were not so hesitant about experimenting with this new idea. In 1921 North Dakota became the first state to have an integrated bar. Two years later statutes were passed creating such a bar in Idaho and Alabama. Today there are

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[32] Guthrie, **op. cit., supra,** note 36, at 233.

[33] Jackson, **op. cit., supra,** note 34, at 316.

[34] Ibid, 320-321.

organized bars in 27 states,[41] Puerto Rico and the Virgin Islands. Integration in these states has been accomplished by (1) legislative action in the form of detailed statutes, or (2) legislative action authorizing the state supreme court to integrate the bar, or (3) promulgation of rules by the state supreme court by virtue of its inherent judicial power to regulate the profession. Wisconsin is in the third category, together with Florida, Missouri, Nebraska, Oklahoma, and the Virgin Islands. The Virgin Islands has the only bar integrated by a federal court.

Wisconsin is the most recent state to integrate its bar, but other states are considering it, and this year the integration issue was revived in New York by Chief Judge Charles S. Desmond of the Court of Appeals.[42]

No state having an integrated bar has reverted to a voluntary form of organization.[43] Time and experience are the tests of most undertakings. The success of the integrated bar where tried is attested by the comments of those in the best position to know—the supreme court judges of integrated states.[44]

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[41] Alabama (1923), Alaska (1955), Arizona (1933), Arkansas (1938), California (1927), Florida (1949), Idaho (1923), Kentucky (1934), Louisiana (1940), Michigan (1935), Mississippi (1930), Missouri (1944), Nebraska (1937), Nevada (1929), New Mexico (1925), North Carolina (1933), North Dakota (1921), Oklahoma (1939), Oregon (1935), South Dakota (1931), Texas (1939), Utah (1931), Virginia (1938), Washington (1933), West Virginia (1945), Wisconsin (1957), Wyoming (1939). Arkansas has an integrated bar for disciplinary purposes only.

[42] Glaser, Bibliography on the Integrated Bar, 10 (1960), prepared by the Bureau of Applied Research of Columbia University, citing speeches by Judge Desmond.

[43] The Oklahoma legislature in 1939 repealed the State Bar Act. However, within a few months the Oklahoma Supreme Court integrated the bar under its inherent power.

[44] **Supreme Court Justices Present Views on bar Integration,** 25 Jour. Am. Jud. Soc. 91, 126, 159 (1941-42), setting forth letters from judges of states having integrated bars.

When the Florida bar was integrated in 1949, the court remarked that "Letters received from the States in which the integrated bar has been tested, recommend it as a vast improvement over the voluntary organization and proclaim that they would under no circumstances return to the old system." *Petition of Florida State Bar Assoc.*, 40 S. 2d 902, 904. Dean Pound puts it somewhat differently when he asserts that integration in all the states is the ultimate stage in reprofessionalizing the bar." "Organization of the profession as such was the way out at the end of the colonial era and at the end of the frontier era," he says. "I submit that completion and perfection of professional organization is what may save us from another era of decadence and resulting injury to law and to constitutional democracy."[10]

II.

THE PRACTICE OF LAW IS A PRIVILEGE SUBJECT TO REGULATION IN FURTHERANCE OF THE ADMINISTRATION OF JUSTICE AND NOT A CALLING IN WHICH EVERYONE HAS A VESTED RIGHT TO ENGAGE.

A. *The Practice of Law is a Privilege Burdened with Conditions because it is an Integral Part of the Administration of Justice*

Underlying appellant's argument is the proposition that the practice of law is like any other activity or calling, insofar as constitutional rights are concerned.[11] Accord-

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[9] Pound, **op. cit., supra,** note 5, at 8, 349, and 362.

[10] Ibid. XXVIII of Preface.

[11] Appellant's Brief, 45-49.

ingly, he asserts "there is no reason for saying that attorneys have less constitutional rights of freedom than those persons in other professions and callings.""

This is a high-sounding statement, but it ignores the role and public responsibility of the lawyer in the administration of justice. The practice of law is different from other professions and pursuits because of its unique relationship to one of the primary departments of government. As one writer said, "The regulation of the Bar and the practice of law is unlike the regulation of barbers or physicians for the reason that the courts and the general administration of justice are so inextricably affected.""

It is not that lawyers are in a special class above other callings, trades, or occupations. Rather it is that they are subjected to special regulation because of their day-to-day part in the functioning of the judicial system. Such regulation may place restraints upon the freedom of the lawyer, compared to the freedom of those in business or other callings, but it is intended to serve the people and insure their rights under our constitutional form of government.

As was said so well in *Schware v. Board of Bar Examiners*, 353 U. S. 232, 247 (concurring opinion):

> "Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-

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"Ibid, 50.

"Bennett, Non-Lawyers and the Practice of Law Before State and Federal Agencies, 46 Am. Bar Ass'n. Jour. 705, 706 (1960).

dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' "

Accordingly, the courts have held that there is no natural or constitutional right to practice but that a privilege is granted conditioned upon compliance with certain qualifications, standards, and regulations. One of the most frequently cited cases on this point is *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 470-471, 162 N. E. 487, 489, in which the court said:

" 'Membership in the bar is a privilege burdened with conditions.' Matter of Rouss, supra, 221 N. Y. page 84, 116 N. E. 783. The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

The same thought is expressed in the case of *In re Greer*, 52 Ariz. 385, 389, 81 P. 2d 96, 98, in the following language:

". . . The right to practice law is not a natural nor constitutional one, in the sense that the right to engage

in the ordinary avocations of life, such as farming, the industrial trades and the mercantile business is. It has always been considered as a privilege only, bestowed upon certain persons primarily for the benefit of society, and upon such terms and conditions as the state may fix. The final determination as to what these conditions are, and who has satisfactorily complied therewith, is, and always has been, in the courts before which the individual practices his profession, and from time immemorial such individuals have been considered essentially and primarily as officers of the court admitting them."

Similarly, the court said in *Petition for Integration of Bar of Minn.*, 216 Minn. 195, 200, 12 N. W. 2d 515, 518:

". . . The practice of law is not a property right guaranteed or protected by either the state or federal constitution. It is a privilege conferred on the individual by the court to further the administration of justice. Lawyers will agree that the administration of justice, the protection of the public, and the safeguarding of the rights guaranteed by the constitution outweigh the court's obligation to maintain the privilege accorded the individual lawyer in admitting him to the practice of law."

This Court stated the proposition succinctly in *In re Isserman*, 345 U. S. 286, 289, when it said, "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice"; and again in *Theard v. United States*, 354 U. S. 278, 281, when it declared, "The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court."

This Court has also held that the "right" to practice law is not a privilege or immunity of a citizen protected by the United States Constitution, either under Article IV or under the Fourteenth Amendment, but the question whether women shall be admitted to practice is for the determination of state courts. *Bradwell v. The State*, 16 Wall. 130, 137-139; *In re Lockwood*, 154 U. S. 116, 117-118. One of the reasons for refusing admission in the *Bradwell* case was that the applicant, being a married woman, could not enter into binding contracts. In the *Lockwood* case the Court merely said it was up to the state court to construe the Virginia statute and to determine whether the word "person" as used therein was confined to males.

Other cases of interest holding that the practice of law is a privilege burdened with conditions and not a natural, vested, or constitutional right, are *In re Gibbs*, 35 Ariz. 346, 353, 278 P. 371, 374; *State Bar Ass'n. v. Conn. Bank & Trust Co.*, 145 Conn. 222, 234, 140 A. 2d 863, 870; *In re Cox*, 164 Kan. 160, 167, 188 P. 2d 652, 657; *Matter of Co-operative Law Co.*, 198 N. Y. 479, 483, 92 N. E. 15, 16; *In re Thatcher*, 190 Fed. 969, 974-975 (N. D. Ohio). In the last case cited the court called it "an extraordinary privilege" granted on certain conditions and described the lawyer's role in the judicial process as follows:

> "By approved practice and ex necessitate an attorney at law is clothed in some measure with the court's power. For instance, his engagement in a case gives him the right to command the court's processes of summons and subpoena, and the court's officers are at his call to execute his will in behalf of his client for many purposes. His retainer gives him the ear of the court, and also affords him the court's protection against a

refractory client. He is the only proper vehicle of communication between the court and his client, and upon him the court must rely for the performance of many intimate and responsible duties. These and other considerations suggest that to call him an officer of the court is by no means a figure of speech." (974-975)

Thus, it is well settled that no one has a vested right to practice. It is a privilege subject to regulation to facilitate the administration of justice, which is clearly a legitimate objective of government.

B. *Regulation of the Practice Rests with the Courts under their Inherent Supervisory Power over the Bar, subject only to the Provisions of the Fourteenth Amendment*

Legislatures have acted in the field of bar regulation, but the courts have countenanced such action only as imposing minimum qualifications to protect the public interest and to aid the judiciary. The final and ultimate repository of power to regulate the legal profession rests with the courts. *In re Opinion of the Justices,* 279 Mass. 607, 609, 180 N. E. 725, 727; *In re Cannon,* 206 Wis. 374, 396, 240 N. W. 441, 450.

In *People ex rel. Karlin v. Culkin,* 248 N. Y. 465, 162 N. E. 487, the question was whether the court had the power to direct a general investigation into "ambulance chasing" in New York on the petition of three bar associations and in the course of that inquiry to compel an attorney to testify as to his professional conduct. Chief Judge Cardozo had no doubt about the court's power. He studiously traced it from "the history of the profession in its

home across the seas," and concluded that it was an inherent or implied power, regardless of constitutional or statutory authority. He said:

> "With this background of precedent there is little room for doubt as to the scope and effect of the provision in the Constitution of 1777 that attorneys might be regulated by rules and orders of the courts. The provision was declaratory of a jurisdiction that would have been implied, if not expressed. . . .
>
> ". . . In the long run the power now conceded will make for the health and honor of the profession and for the protection of the public. If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work." 248 N. Y. 465, 477-480, 162 N. E. 487, 492-493.

This same principle of inherent judicial power over the profession has long been recognized in connection with bar integration. When the Nebraska bar was integrated by judicial order, the court in a scholarly opinion discussed at length its inherent power over the practice of law. *In re Integration of Nebraska State Bar Ass'n.*, 133 Neb. 283, 286-289, 275 N. W. 265, 266-268. Good discussions of the subject are also to be found in *Petition of Florida State Bar Ass'n.*, 40 S. 2d 902, 905-906; *Petition for Integration of Bar of Minn.*, 216 Minn. 195, 199, 12 N. W. 2d 515, 517-518; *In re Integration of State Bar of Oklahoma,* 185 Okla. 505, 506-507, 95 P. 2d 113, 114-116; *Integration of Bar Case,* 244 Wis. 8, 36-54, 11 N. W. 2d 604, 617-625.

The regulatory power of the courts, however, may not be exercised in an arbitrary, discriminatory, or capricious manner. The conditions imposed must be within the bounds of due process and the equal protection of the laws under

the Fourteenth Amendment. Regulation must be reasonable and have a rational relation to the end to be attained. *Ex Parte Secombe,* 19 How. 9, 13; *Schware v. Board of Bar Examiners,* 353 U. S. 232, 239, and concurring opinion at 248-249. See, also, *Dent v. West Virginia,* 129 U. S. 114, 122, 124; *Graves v. Minnesota,* 272 U. S. 425, 428.

Discussing the power of the courts over the bar and the limits of that power, Chief Justice Taney, in *Ex Parte Secombe, supra,* said (13):

> ". . . And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."

III.

INTEGRATION IS A REASONABLE MEANS OF REGULATING THE LEGAL PROFESSION AND PROTECTING THE PUBLIC INTEREST IN THE ADMINISTRATION OF JUSTICE UNDER THE FOURTEENTH AMENDMENT

A. *The State Bar is not a Private Organization but a Public Agency subject to Supervision by the State Supreme Court*

"Integrated bar associations are political associations—political parties," says the appellant. "Not only is the association a political party but it is a party organized along the lines of class."[50]

He offers no facts, admits that the State Bar does not support candidates for judicial or other office, and simply asserts, "It has certain aims and principles and a certain line of public policy which it desires and seeks to have carried out by the government."[51] So do most public agencies and many other organizations—charitable, educational, and otherwise.

It is apparent that appellant misconceives the true nature of the State Bar. The court below held that it is a *public* and not a *private* agency (R. 75). This is in accord with prior expressions of other courts concerning the character of the integrated bar. *State Bar v. Superior Court*, 207 Cal. 323, 328-329, 278 P. 432, 434; *In re Gibson*, 35 N. Mex. 550, 570-571, 4 P. 2d 643, 653. It is an arm or agency of the court established to promote the administration of

[50] Appellant's Brief, 58, 60.

[51] Ibid, 60.

justice. It has been said by the author of an annotation on integrated bars in 114 A. L. R. 161, at 161, that regardless of whether such bars are created by statutes or court rules, they "have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies."

The most recent case on this point is *State Bar of Michigan v. City of Lansing*, 105 N. W. 2d 131, decided September 16, 1960. This was a proceeding to determine whether the property of the State Bar was exempt from taxation. The Supreme Court affirmed the trial court's finding that such property is "public property belonging to the State of Michigan and as such is exempt from taxation" (137). It held that the bar was not a private organization but a governmental agency created for the specific public purpose of performing functions pertaining to the judiciary (135).

The public and governmental character of the State Bar of Wisconsin is demonstrated by the enumeration of purposes in Rule 1, § 2, of the State Bar rules, all "to the end that the public responsibilities of the legal profession may be more effectively discharged." Its general public purpose was also proclaimed by the legislature in § 256.31 (2), Wis. Stats., which declared that the Supreme Court should provide for the organization and government of the State Bar "to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

Thus, appellant is not asked to join a private association—and certainly not a political party—but a governmental body created for a public purpose and subject to the supervision of the court.

B. *Integration Provides a Democratic, Self-Governing form of Regulation for the Bar*

The integrated bar is a representative and democratic organization of the profession as a whole, with full opportunity for self-government. It is more democratic than the old voluntary type of association because it includes and represents all members of the bar. Unlike some voluntary associations, no one is excluded from the integrated bar by reason of race, color, creed, or class.

In fact, the lawyer in the State Bar of Wisconsin enjoys far more freedom and democracy than any other licensee in that state. Other professions are regulated by examining boards such as the boards of medical examiners, dental examiners, pharmacy examiners, etc. In all instances the members of the profession have little or nothing to say about the functioning of such boards or appointments to them, which are made by the Governor. The integrated bar, on the other hand, operates under a democratic process whereby the members of the bar elect their own officers and board of governors, can initiate direct action in the assembly or by petition, and have the opportunity to participate in the work of the sections and committees. When it ordered integration made permanent, the Wisconsin court said:

> "These rules and by-laws constitute a democratic process by which members of the bar can govern themselves and can act in unison and by which minorities are protected; and they provide appropriate procedures for invoking the supervisory power of this court." *In re Integration of the Bar*, 5 Wis. 2d 618, 627, 93 N. W. 2d 601, 605.

Although given the freedom and authority of self-government, the integrated bar cannot abuse its power because it is always subject to the supervisory control of the court. If it should engage in activities or embark on policies outside its proper scope, the court has made it clear it can and will take remedial action. *In re Integration of the Bar*, 5 Wis. 2d 618, 624-625, 93 N. W. 2d 601, 604.

The board of governors of the State Bar is an elected, representative policy-making body. When it decides a matter within its province,

> ". . . everyone understands or should understand the policy is that of the State Bar as an entity separate and distinct from each individual. Such pronouncement of the State Bar does not necessarily mean all of its members agree with that pronouncement, nor is it necessary for them to do so. Individual members are free to think and to express their own opinions. But it is in the nature of a representative democratic organization that the elected representatives of the group speak and act for it in accordance with its organic laws." *In re Integration of the Bar*, 5 Wis. 2d 618, 623, 93 N. W. 2d 601, 603.

C. *Bar Integration is Fair and Equitable because it Requires All Members to Pay their Just Share, in the form of Annual Dues, for the Purpose of Regulating and Improving the Profession*

An annual fee from each lawyer simply means that each is required to pay his fair share of the costs of policing and improving his profession. There are no "free riders" in the integrated bar. It is only reasonable and right that all should contribute for this purpose, rather than to leave it to the personal volition of each lawyer, so that some will bear their share and others will escape.

This principle is not new, of course. We all know that annual license fees are required of other professions, trades, and occupations which are subject to regulation. In Wisconsin such fees are imposed annually on architects, chiropractors, barbers, plumbers, well drillers, funeral directors, doctors, dentists, engineers, real estate brokers, optometrists, and others. The fees range from $3.00 in the case of veterinarians[32] to $25.00 for master plumbers[33] and optometrists.[34] Chiropractors,[35] real estate brokers,[36] and well drillers[37] each pay $15.00 per year.

The annual dues of the integrated bar are well within the above range. Active members are called upon to pay $15.00 a year, except that a newly admitted lawyer is re-

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[32] Wis. Stats., sec. 95.53.

[33] Ibid. sec. 145.08 (1) (b).

[34] Ibid. sec. 153.06 (1).

[35] Ibid. sec. 147.23 (7).

[36] Ibid. sec. 136.06 (3) (b).

[37] Ibid. sec. 162.04 (1).

quired to pay only $8.00 annually, and inactive members pay $5.00 per year (R. 28).

The court below held that the dues requirement of lawyers under integration falls in the same category as annual license fees imposed upon any other occupation or profession which is subject to state regulation, citing various cases (R. 71). Other cases sustaining the validity of integrated bar dues are annotated in 114 A. L. R. 161, 165-168, and 151 A. L. R. 617, 619-621.

When the integrated bar of Florida petitioned in 1952 to increase its annual dues, which amounted to only $5.00, objection was raised as to the validity of such dues. The court summed up the whole issue as follows:

> "One of the primary objectives of the Integrated Bar was to bring every attorney into the organization in order that he might have a part in and bear his share of the burden of giving these and other services to the bar and the people. To contend that such services should be supported by voluntary contributions is equivalent to contending that those who do not choose to contribute have no responsibility to the bar or the public—to say, in other words, that the law profession is nothing more than a trade to make a living. There certainly should be no objection on the part of any lawyer who is sensitive to the duty his profession is charged with, to meet his share of the burden. . . . The services rendered by the Integrated Bar of Florida are not unlike those being rendered by the Integrated Bar in other States; they are advocated and supported by the best professional thought in the country and are considered essential to the well being of the profession." *In re Florida Bar*, 62 S. 2d 20, 23.

One of the reasons given by the Wisconsin Supreme Court when it ordered integration in 1956 was that the voluntary association had become static and a substantial minority of the lawyers did not belong and support it. *In re Integration of the Bar*, 273 Wis. 281, 283, 77 N. W. 2d 602, 603. Appellant maintains this is not a sufficient or overriding reason to justify integration." However, the fact that a substantial minority (20 to 25 per cent) of non-union members did not join and contribute to the support of labor unions but enjoyed the benefits of collective bargaining by the unions, was considered by this Court a legitimate reason for the enactment of § 2, Eleventh of the Railway Labor Act to permit all-union shop agreements. *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 231.

D. *The Integrated Bar is Able to Render Greater and More Effective Service to the Public and the Profession than the Voluntary Bar*

With limited resources, interest, and participation, the old voluntary bar could not hope to undertake the work and achieve the goals of the integrated bar. The receipt of annual dues from all lawyers makes it possible for the integrated bar to render greater service to the profession and the public.

This has already been demonstrated in the short experience with integration in Wisconsin. After a trial period of two years, the Wisconsin Supreme Court found:

"Under integration the State Bar has increased its services to lawyers in this state, promoted the high

"Appellant's Brief, 51-52.

standards of the members of the profession, and increased its contribution to public service and to the administration of law and justice." *In re Integration of the Bar*, 5 Wis. 2d 618, 621; 93 N. W. 2d 601, 602.

In an appendix to its opinion the court below gave an analysis of some major activities of the State Bar, based upon facts of which it took judicial notice (R. 76, 77-81). The court dwelt upon the public purpose served by the various activities of the integrated bar, but made special note of increased services as a result of integration in the fields of unauthorized practice (R. 79) and the investigation and handling of grievance complaints (R. 81). Other integrated bar states have had similar results of greater work and more effective service."

Appellant states in his complaint (R. 4) that integration has doubled the income from bar dues—from $45,000.00 in 1956 under the voluntary organization to approximately $90,000.00 under the State Bar. Such added resources naturally and obviously enable the State Bar to do more work and render more service, not only in the fields of unauthorized practice and professional misconduct, but in many other areas in which it is active, such as the programs for continuing education of the profession, the improvement of practice and procedure, court reorganization, legal aid and other public services, to mention a few.

In addition to providing greater service because of added income, the integrated bar stimulates broader inter-

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"Wicker, **The Pros and Cons of An Integrated Bar**, 23 Tenn. L. Rev. 457, 458 (1954). See, also, **Supreme Court Justices Present Views on Bar Integration**, 25 Jour. Am. Jud. Soc. 91, 126, 159 (1941-42).

est and participation in its activities by the profession."[10] This prompted President-elect Howard L. Barkdull of the American Bar Association, a voluntary association, to say that "The influence and accomplishments of the legal profession in the states which have adopted the integrated form of organization are sufficient to make clear that this is one of the most effective ways of strengthening state bar activities. The spread of the integration movement has been accompanied by increased record of performance on the part of the profession in these states, and the extension of integration among the twenty-three voluntary states will probably do more to increase the strength of the organized bar in those jurisdictions than can be accomplished by any other single factor.""[11]

E. *The Integrated Bar Fixes Responsibility upon the Whole Profession and Gives it a Better Opportunity to Discharge its Duties in the Administration of Justice*

Finally, integration makes the whole profession a cohesive, functioning unit with responsibility for its public duties more firmly fixed. The integrated bar has been defined as "the process by which every member of the bar is given an opportunity to do his share in carrying out the public service of the bar, and obliged to bear his portion of the responsibility." 114 A. L. R. 161, at 161.

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[10]Winters, **Integration of the Bar—You Can't Lose,** 39 Jour. Am. Jud. Soc. 140, 144 (1956).

[11]Barkdull, **Methods of Strengthening Bar Associations,** 35 Jour. Am. Jud. Soc. 9, 14 (1951), a report to the Survey of the Legal Profession.

The history of the bar in England and America demonstrates, as pointed out in Part I of our Argument, that if discipline and high standards are to be maintained, and the profession cleansed of the unfit, these things can best be done by the profession itself. Certainly the courts from their isolated position cannot exercise effective surveillance and control of the bar themselves. That can only be accomplished with the cooperation and assistance of the bar—not just part of it in the form of voluntary associations—but by the profession as a whole organized with authority commensurate with its public responsibilities.

Referring to the high standards of the integrated bars of England and France, Professor Edson R. Sunderland says, "All political experience indicates that it is futile to expect services of a public nature to be satisfactorily performed otherwise than by vesting adequate power in those chargeable with the character of the results. The movement for an integrated, self-governing bar is in accord with that experience."[11]

It is important to recognize, too, that the profession has problems and obligations as a whole which are quite different from those of the voluntary association. They cannot be dealt with by individuals or groups, sometimes active and more often inactive, usually without adequate funds, and always speaking only for themselves or a part of the profession.

The public looks upon the profession as a unit, and the conduct of a lawyer reflects credit or discredit on the bar

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[11]Sunderland, **A Unified and Self-Governing Bar**, 11 Tenn. L. Rev. 236, 246 (1933).

regardless of bar association membership. An all-inclusive bar representing and having supervision of the whole profession has more standing and authority to protect itself and the public against transgressing members. The ethics of the profession can be maintained and unprofessional conduct controlled more effectively as to members of a bar organization than as to non-members. Enforcement of the rules is easier when there is an organization to which all belong who are subject to such rules.

A whole bar can do more than half a one. There is no such thing as half a lawyer. Once having made the voluntary choice to enter the legal profession and to become an officer of the court, the lawyer must accept the burden of bearing his portion of the responsibility along with the privileges and emoluments. In other words, he assumes his position as officer of the court *cum onere*. The rules of the court may reasonably require, we submit, that if he wants to get into the game he must join the team.

These are some of the factors the Wisconsin Supreme Court had in mind when it ordered integration in 1956 and ordered it continued in 1958. In its 1958 decision the court put it this way:

> ". . . All members had the same opportunity and have freely chosen a profession subject traditionally to discipline and control by the courts. It is not undemocratic to require those who are privileged to practice law and are entrusted with the duty to secure or protect the property, rights and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group and to increase the effectiveness of their service to the public. . . . Most objections have cen-

tered around the obligation to bear a portion of the responsibility. In the nature of things, every privilege has a correlative obligation." *In re Integration of the Bar*, 5 Wis. 2d 618, 622-623, 93 N. W. 601, 603.

* * *

Thus, we believe it is clear that integration is a reasonable means of regulating the profession. It is not in any sense arbitrary, capricious, or discriminatory but fair and just to all concerned, and is well within the limits of regulation under the due-process and equal-protection clauses of the Fourteenth Amendment. *Dent v. West Virginia*, 129 U. S. 114, 122-124; *House v. Mayes*, 219 U. S. 270, 282, 284; *Douglas v. Noble*, 261 U. S. 165, 168-170; *Graves v. Minnesota*, 272 U. S. 425, 428; *Semler v. Dental Examiners*, 294 U. S. 608, 610-612.

IV.

THE INTEGRATED BAR DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF ASSOCIATION OR FREEDOM OF SPEECH UNDER THE FOURTEENTH AMENDMENT

We have touched upon the history of integration—how and why it developed—and the public aspects of the practice of law because it is so inextricably bound up with the administration of justice. The interest of society in this calling is so fundamental that there never has been any doubt that it is subject to regulation under the police power or the inherent supervisory power of the courts. We have attempted to show that bar integration is a legitimate or

valid exercise of that regulatory power, in that the rules promulgated by the Wisconsin Supreme Court are a reasonable form of regulation and are not arbitrary or discriminatory.

However, appellant maintains that integration goes beyond the legal limits of regulation to which the profession is subject, and in so doing invades his First Amendment freedoms. His contentions are: (1) that as a general proposition his freedom of association is violated by being compelled to be a member of the integrated bar; and (2) that his freedom of speech is violated if the State Bar expresses views with which he does not agree, particularly on legislative proposals. However, the record is devoid of any specific showing of actual interference with his right of speech, even as to legislative matters. Thus, with respect to freedom of speech, his objection is also a general one, i.e., that the S Bar may take positions on legislative or other ques contrary to his beliefs.

Accordingly, we address ourselves to these two general contentions of infringement of association and speech.

A. *Appellant's Freedom as a Member of the Bar is not Limited any more after Integration than before Integration*

Appellant quotes many worthy precepts with which no one would disagree, but he does not indicate anywhere in what particulars his freedom as a lawyer is limited any more now than before integration. The weakness of his position lies in the fallacy of his major premise, namely,

the assumption that his liberty has in actual fact been invaded.

Nowhere in his brief does he contend that annual fees or dues cannot be required of attorneys for regulation of the profession. He cannot, we are sure, seriously question the validity of imposing such fees in view of the well-established authorities for requiring them of other professions, occupations, or trade which are subject to regulation."

The essence of his position, therefore, is that his constitutional rights are curtailed because he is compelled to "belong" to the State Bar.

But in order to practice he was required to be a member of the bar before integration. Every practitioner must be admitted to the bar and remain a member in good standing, whether the bar is integrated or not.

When appellant made his own free choice to enter the profession, he accepted the conditions and restraints that go with the prerogatives. Like every other lawyer, he became an officer of the court, subject to its rules, discipline, and control. As such, his freedom has been restricted in various ways. He cannot, for example, exercise the right which others have to advertise and solicit business. His mouth is sealed as to confidential communications from clients. He must defend the indigent prisoner when designated by the court. He must give unswerving loyalty to his clients and exercise the highest degree of candor, honesty, and fidelity to the courts. These and all the other rules of professional conduct bind him and compel his constant obedience, but

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"Innumerable cases are cited in 16A C.J.S. at pp. 1004 and 1012 et seq.

they have never been considered as violating First Amendment rights.

These regulations apply to appellant now as much as they did before the creation of the State Bar. What integration did was organize the group or body known as the "bar" and give it some means with which to enforce the ethical standards above mentioned and in other ways improve the profession. Whether organized or not, the Supreme Court bar of a state has aptly been described as a "body politic" because it is a body of officers of the court commissioned under the laws of the state and constituting an integral part of its judicial department."

Thus, the group to which appellant was required to belong before integration is the same as the group of which he now must be a member. In each case it includes all those who are licensed to practice law. The only difference is that now the group is organized instead of disorganized, and thus better able to function and discharge the obligations of the profession.

In what manner is appellant's freedom of association or of speech invaded by this change in the bar body politic? As the court below pointed out,

> "The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the Bar is the payment of the annual dues of $15.00 per year. He is as free as he was before

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"From report of special committee to the Conference of Bar Association Delegates in 1920, recommending integration, published in 4 Jour. Am. Jud. Soc. 83, 85 (1920).

to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar" (R. 70).

The issue of freedom of association and speech was also raised when a member of the integrated bar of New Mexico refused to pay his annual dues. The court held there was no infringement, saying that the legislature simply seized upon the list of the bar as a body upon which its regulatory measures were designed to act, and respondent's admission as a duly licensed attorney automatically made him a member of that body. *In re Gibson*, 35 N. Mex. 550, 559-561, 4 P. 2d 643, 648-649. It pointed out:

> "In so far as any duties or privileges are created or conferred upon members of the State Bar collectively, they are entirely optional to be availed of or not as the member elects. Every member of the State Bar is privileged to participate by his vote in the selection of the Bar Commissioners, though he cannot be compelled to do so. And the language of section 11 of the act providing for an annual meeting of the members of the State Bar but emphasizes the entire want of compulsion to membership or participation in its deliberations. . . .
>
> "He who does not desire need not attend. Penalty does not attach for non-attendance. And the only detriment suffered for failing to participate in the annual meetings is the loss of the splendid benefits universally conceded to flow therefrom, through an interchange of ideas, discussions for the common good of the bar, and the reading by eminent members of the profession of carefully prepared papers on subjects of current interest." 35 N. Mex. 550, 561, 4 P. 2d 643, 649.

B. *The Hanson Case Settles the Issue of First Amendment Rights in this Case, and Freedom of Association in Particular*

The major error in appellant's concept of freedom of association and speech is his refusal to accept the unanimous decision of this Court in *Railway Employes' Dept. v. Hanson*, 351 U. S. 225. He declares that either the Court did not pass upon freedom of association in that case, or if it did, it was wrong and should reconsider its decision."

Hanson presented squarely the question of the validity of a union shop agreement compelling all employees to belong and pay dues to a union, as authorized by § 2, Eleventh of the Railway Labor Act. The trial court issued an injunction. It was affirmed by the Nebraska Supreme Court, which held that the union shop agreement under § 2, Eleventh, violates the First Amendment because it deprives employees of their freedom of association and also violates the Fifth Amendment because it requires members to pay for many things besides the costs of collective bargaining. This Court reversed, upholding the constitutionality of § 2, Eleventh, and the validity of the agreement.

The Court discussed the background of § 2, Eleventh, noting that by 1950 between 75 and 80 per cent of all railroad employees belonged to independent unions (as distinguished from "company" unions). While non-union members enjoyed the benefits of collective bargaining by the unions, they made no contribution to the support of the unions. To correct this situation, Congress enacted § 2,

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"Appellant's Brief, 41.

Eleventh of the Railway Labor Act to permit union shop agreements.

The issue of First Amendment rights, and freedom of association in particular, was considered and decided explicitly by the Court. "Wide-ranged problems are tendered under the First Amendment," it said. "It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights" (236). The objections urged were strikingly similar to those of appellant in the instant case. However, the Court put these aside, saying (238):

> "*On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.* It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safe-guard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." (Emphasis added.)

The reference to the integrated bar is dictum, of course, but the principle of *Hanson* is just as applicable to the all-inclusive bar as to the all-inclusive union. If there is no

constitutional barrier to the all-union labor organization, there should also be none to the all-lawyer bar organization. Improvement of the legal profession and the administration of justice is to the bar what collective bargaining is to the labor union. It is not unreasonable to compel workers to join together in common efforts and support for bargaining purposes. Likewise, it seems altogether reasonable to require lawyers to join together for the purpose of advancing the interests and standards of the profession. In the case of the bar, there is the added fact that the legal profession is a special calling affected with a public interest and subject to supervisory control, and all members can logically be expected to join in facilitating such regulation and sharing its costs.

Appellant also states that if the *Hanson* case decided there was no violation of freedom of association, this Court erred in not determining whether there was a subordinating compelling interest to permit invasion of such freedom." This assumes there was some question of infringement, but the Court expressly held that on the record before it there was no problem of First Amendment rights. 351 U. S. 225, 238. Consequently, the Court must have felt there was no need for balancing competing interests or finding a compelling interest under such cases as *Barenblatt v. United States*, 360 U. S. 109, 126; *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 463, 466; *Sweezy v. New Hampshire*, 354 U. S. 234, 254; *Watkins v. United States*, 354 U. S. 178, 198; *American Communications Assn. v. Douds*, 339 U. S. 382, 399; *United Public Workers v. Mitchell*, 330 U. S. 75, 96, 102; *Schneider v. Irvington*, 308 U. S. 147, 161.

" Appellant's Brief, 41.

The issue in *Hanson* was one of lawful regulation of labor relations under the Commerce Clause. On this question the Court said (233):

> ". . . Industrial peace along the arteries of commerce is a legitimate objective, and Congress has great latitude in choosing the methods by which it is to be obtained.
>
> "The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one."

The wisdom of such regulation is a matter for Congress and not the judiciary, it pointed out (234). "The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises" (234). It concluded, therefore, that the requirement for financial support of a labor organization by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendment (238).

The same test of the exercise of regulatory power, it is submitted, applies to the integrated bar. It must be reasonable and not arbitrary or discriminatory, and have a rational relation to the end to be attained; and in choosing the methods for such regulation every reasonable latitude should be allowed the judiciary in which rests the exclusive authority to license and remove those who practice law. See *Ex Parte Secombe*, 19 How. 9, 13; *In re Summers*, 325 U. S. 561, 570-571.

That is not to say there is no compelling interest of the state in integrating the bar, but only that there is no

problem of First Amendment rights. The fair and efficient functioning of the judicial department is a fundamental concern of government. Improvement of the bar and maintenance of high standards will improve the administration of justice. This is a necessary and worthy objective in which the state has a paramount interest. That the integrated bar is a legitimate and effective means of promoting this interest is not based upon conjecture but upon experience with integration in 26 states besides Wisconsin, none of which has gone back to the voluntary form of organization, and by the experience in Wisconsin as evidenced by the statement of the Wisconsin Supreme Court after integration's trial period of two years, that "Under integration the State Bar has increased its services to the lawyers of this state, promoted the high standards of the members of the profession, and increased its contribution to public service and to the administration of law and justice." *In re Integration of the Bar*, 5 Wis. 2d 618, 621, 93 N. W. 2d 601, 602.

C. *The Legislative Activities of the State Bar do not Infringe upon Appellant's Freedom of Speech*

1. *The record in this case on legislative activities of the State Bar does not disclose any infringement*

There was some evidence of both political and legislative activities on the part of the unions in the *Hanson* case. The Nebraska Supreme Court said "it is apparent that some of these labor organizations advocate political ideas, support political candidates, and advance national economic

concepts which may or may not be of an employee's choice." *Hanson v. Union Pac. R. R. Co.*, 160 Neb. 669, 697, 71 N. W. 2d 526, 546. There was evidence that union dues were used to maintain legislative representatives on both the state and national levels (record in Supreme Court, No. 451, October Term, 1955, 125, 126, 135, 136, 144, Exs. 7, 9, 10), to pay for subscriptions to Labor which issued special election editions urging support of candidates for public office (*ibid*, 143, Ex. 10) and for other political purposes (*ibid*, 254-256, Ex. 31).

However, this Court was of the opinion that the record before it was such that it did not present questions of imposing dues for purposes not germane to collective bargaining, or of imposing other conditions of membership, or of exacting dues "as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 235, 238. "It is argued that compulsory membership will be used to impair freedom of expression," it said. "But that problem is not presented by this record" (238).

Likewise, it is submitted, no problem of freedom of expression is actually presented by the record in the instant case, and there is no evidence of any political activities. Appellant's argument about freedom of speech seems to boil down to his objection to the State Bar engaging in legislative activities, but the record discloses no infringement.

This case came up on a demurrer (R. 49) to the complaint (R. 1-48). In Wisconsin a demurrer does not admit conclusions of law, *M. Carpenter Baking Co. v. Dept. of Agriculture & Markets*, 217 Wis. 196, 199-200, 257 N. W.

606, 607, nor erroneous conclusions drawn from facts by the pleader even though they bear the semblance of statements of fact. *Northwestern Mut. L. Ins. Co. v. State*, 173 Wis. 119, 125, 180 N. W. 138, 141. For example, it would not admit the statement in appellant's letter when he paid his dues under protest (R. 47-48), which is made a part of the complaint, to the effect that the State Bar is "authorized and directed to engage in political and propaganda activities" under its rules and by-laws (R. 48); nor do we believe it would admit erroneous generalizations about the functions and activities of the State Bar (R. 5).

As to legislative matters, the allegations of the complaint are general, directed against all legislative services (R. 5). There is no specification of measures on which the bar has taken a stand with which appellant disagrees. The only indication of disagreement on his part is an allegation that the bar opposed legislation which he favored, but there is no clue as to what it was (R. 6). He alleges simply that the bar studies laws relating to the practice and the courts and to various general fields of law and "in furthering its objects and purposes," makes and opposes proposals for changes in such laws (R. 5). There is no indication of the extent of such legislative activities nor of the precise nature of the measures supported or opposed, particularly in the general fields of law mentioned by him, and as to whether they deal with practice and procedure or substantive law or a mixture of both.

In an effort to bolster the record on this point, he asks this Court to take judicial notice of minutes of various meetings of the board of governors and executive committee at which he says specific measures were supported or op-

posed." With the apparent purpose of showing the extent of the bar's legislative activities, he states in his brief[67] that 10 per cent of the time of the executive director is devoted to lobbying on behalf of the bar, citing a report to the Secretary of State made after the court below decided the case.[68] He arrives at the figure of 10 per cent because the State Bar reported $1,400.00, which was 10 per cent of the executive director's annual salary. He has overlooked, however, the fact that the Wisconsin legislature meets every two years and that the report in question covered the 1959 session, which, with several recesses, was spread over 1959 and 1960. Thus, it would appear that 5 per cent would be a more accurate figure to use.[69] Despite his own claim that the executive director devotes 10 per cent of his time to legislative representation, however, he later quotes a wholly inaccurate statement in a research paper to the effect that several states including Wisconsin employ full-time lobbyists during legislative sessions.[70]

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[67]Appellant's Brief, 20-21. His statement is not entirely accurate, nor is the list complete. For example, the minutes in question do not show any position taken on the workmen's compensation bill or the proposal to elect Supreme Court judges by districts, and with respect to the family code bill the recommendation was that legislative action be deferred until further study could be given to its provisions.

[68]Ibid, 19.

[69]The executive director is registered as a lobbyist because of the broad, all-inclusive provisions of the Wisconsin statutes on the subject. Registration is required of anyone who attempts "personally and directly" to influence any member of the legislature to vote for or against a measure, such as by direct or individual communication with him, except that any citizen "not lobbying for hire" may communicate with members of the legislature. Wis. Stats., sec. 13.70 (1). Mere appearance before a committee does not entail registration, but talking to a legislator on a pending bill does require it if the person speaking is being compensated for so doing.

[70]The report states that the lobby activities of the executive director "are incidental to his general work and occupy only a small portion of his time."

[71]Appellant's Brief, 57.

This is the general nature and extent of the record with respect to appellant's contentions on the subject of legislative services. It is plainly insufficient, we submit, on which to base a constitutional objection. Additional facts were judicially noticed by the court below (R. 72), which are discussed in the following section of this brief, but they support appellee's position and not that of the appellant. They spell out the limited scope of the activities actually engaged in and indicate the public purpose served thereby.

2. *The legislative activities of the State Bar are limited in scope, are non-political, and serve a public purpose*

Whatever the State Bar does in the legislative field is limited by its rules and by-laws promulgated by the Wisconsin Supreme Court. Rule 4, § 4, provides for the establishment of various standing committees, two of which are the Committee on Administration of Justice and the Committee on Legislation (R. 14-15). These two committees deal with legislative matters, and their duties are defined by §§ 4 and 9, Art. IV of the by-laws (R. 35-36) as follows:

> "*Section 4. Committee on administration of justice.* This committee shall study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system."

> "*Section 9. Committee on legislation.* This committee shall study all proposals submitted to the Wisconsin Legislature or the Congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals."

The court below scrutinized all the legislative activities of the State Bar since it was integrated. It said (R. 72):

> "This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice. Neither the above-quoted by-laws nor the stated purposes set forth in Rule 2 for which the bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects."

The court below also dealt with appellant's contention that the legislative activities of the integrated bar are the same as those of the prior voluntary association or of the American Bar Association. Such argument, it said, ignores "the obvious and very material distinction" between legislative activities of the two types of organization. A voluntary organization may take a position on any proposed legislation, but "this is not true of the State Bar, which must confine its activities in legislative matters to those authorized by the rules and by-laws promulgated by this court" (R. 73).

It should be apparent that the legislative activities thus limited are technical, non-partisan, and non-political in character. The State Bar of Wisconsin supports no party candidates and neither advocates nor opposes legislation of a political or partisan nature. Thus, there is involved in the instant case none of the political activities which appear in *International Association of Machinists v. Street*, No. 4, October Term, 1960, now pending before this Court.

The court below was of the opinion "that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar" (R. 75).

It referred to the recent case of *Dulles v. Johnson*, 273 F. 2d 362 (C. A. 2), certiorari denied October 10, 1960 (81 S. Ct. 54), involving the deductibility for Federal estate tax purposes of bequests to certain voluntary bar associations in New York. The question was whether these bar associations were organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation, within the meaning of § 812 (d) of the 1939 Internal Revenue Code. The Court of Appeals reversed the District Court and allowed the deductions. It discussed a number of bar association activities, including regulation of the unauthorized practice, disciplining the profession, improving court procedure and endorsing judicial candidates, and legislative activities. It found that all of them benefitted the

public and served one or more of the purposes for which the tax deduction is allowed.

Improvement of court procedure and even endorsement of judicial candidates, it said, "clearly constitute a public service" because recommendations as to judicial candidates have been non-partisan, and the "lawyers are peculiarly well equipped to seek out and remedy flaws in the judicial machinery and to assess the performances and capabilities of judges. In today's immensely complex society they alone, perhaps, are alert to watch for and attempt correction of manifest defects prior to the time when malfunctions become apparent to everyone" (367).

With respect to legislative activities, the court found they did not constitute propaganda or represent a substantial part of all the activities of the association. The legislative recommendations are designed to improve court procedure or clarify some technical matter of substantive law, it declared, and are not "intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy" (367). Also, the court felt that these legislative activities "serve no selfish purpose of the profession—rather they constitute an expert's effort to improve the law in technical and non-controversial areas," and concluded that they were scientific, educational, and charitable (367).

3. The legislative activities of the State Bar do not prevent any member from expressing his own views and, like such activities of other public agencies, do not violate the constitutional guarantee of freedom of speech

In its 1958 integration decision the Wisconsin Supreme Court pointed out that the State Bar board of governors had adopted working rules and procedure in legislative matters which were fair to all members, and that any member could present any matter to the board at any time. *In re Integration of Bar*, 5 Wis. 2d 618, 621, 93 N. W. 2d 601, 602. These working rules are appended to appellant's jurisdictional statement (42a-46a). They provide that any position taken shall be expressed as the position of the board of governors (43a), instead of the bar as a whole; and that where it is obvious the membership of the bar is of a substantially divided opinion the board shall take no definite position, but in any case may direct that its vote on any measure be reported to the legislature as indicative of the diverse views of the members of the board (43a-44a). The report recommending these rules makes it clear that in taking any position on a pending bill the views expressed should be clearly identified as those of the board, the executive committee, the section, or the standing committee, as the case may be, and not the views of all the lawyers in the state."

Appellant is free, as is any other member of the bar, to express his views at any time on legislative or other matters. He may present them to the board of governors or directly to committees or members of the legislature. He

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"30 Wis. Bar Bull. No. 4, 41, 44 (August, 1957).

may appear at a legislative hearing at the same time that a representative of the board appears and take a position directly opposite to that of the board. At the same time, the fact that he may not agree with some position taken by the board of governors should not deny the free right of the board to take a stand as the duly elected representatives of the profession.

The court below felt that on measures directly affecting the administration of justice and the practice of law, "The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association" (R. 72-73).

In answer to this, appellant takes the extreme position that neither the public nor the legislature is entitled to such opinions from the bar.[73] He talks vaguely of freedom of the mind,[74] but obviously the court did not mean that every lawyer in the state must speak his mind on every legislative proposal regarding the judicial system and the practice. Through the democratic processes of the State Bar, those who are interested will express their views, and majority rule will govern. Others have the full freedom to remain silent.

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[73]Appellant's Brief, 52-54, 69. Appellant then asks why a poll of lawyers was not taken on the question whether the bar should be integrated (54). An expression of opinion by petition was obtained in 1942 which showed overwhelming endorsement of the integrated bar among those canvassed. See 30 Jour. Am. Jud. Soc. 147, 148 (1947), and 27 Jour Am. Jud. Soc. 13, 16 (1943).

[74]Appellant's Brief, 70-71.

If appellant is correct in his contention that his freedom to speak or not to speak is invaded because he must support an agency which takes positions on legislative matters, then the wheels of democratic government must come to a halt. A few illustrations will demonstrate the error of such position.

One example, cited by the court below (R. 75-76), is the state Judicial Council, supported by taxes which no taxpayer can escape. It consists of sixteen members from the bench, bar, and public, selected in different ways. Among its functions is the duty to "recommend to the legislature any changes in the organization, jurisdiction, operation and methods of conducting the business of the courts which can be put into effect only by legislative action." § 251.181 (2) (f), Wis. Stats.

The Judicial Council recommended a comprehensive court reorganization plan several years ago which many judges and lawyers opposed. Although the legislature rejected this plan, it did adopt the one proposed by the Council in 1959, which also was opposed by a number of judges and lawyers.

Another example is the state Legislative Council which functions in a much larger area. § 13.35, Wis. Stats. It operates with a substantial permanent staff and various committees, studying problems in many government areas, including fields of substantive law and procedure such as the family code on marriage and divorce. It makes recommendations for legislative or administrative action, and except for gifts or grants, is supported by tax monies.

In the Federal government there is, of course, the Judicial Conference of the United States created under 28 U. S. C. § 331. It consists of the Chief Justice of the United States and various other Federal judges and meets annually and in special sessions for the purposes of surveying and expediting the business of the courts and studying and recommending to this Court changes in practice and procedure. In addition, it is authorized to and does frequently make recommendations for legislation to Congress, with which this Court is fully familiar.

Moreover, everyone knows that most public agencies or departments—state and national—devote time and effort to the study of legislative matters affecting them, preparing amendments or changes in the laws, appearing before legislative committees, and talking to legislative representatives. Often the bills are highly controversial and the views expressed by public agencies through their officials or employees are hotly opposed by private citizens.

Yet in all these instances it would be unthinkable to say that the taxes which go in part to defray the expenses of such activities are invalid because some taxpayers may oppose the views expressed by public officials.

The State Bar is a public agency, too, created by the court for a public purpose. There is no constitutional difference, we submit, between it making legislative recommendations and other public bodies doing so.

Appellant has the same right to voice his disagreement on legislative recommendations of the bar as has any citizen with respect to proposals made by any other agency of government. Moreover, the legislative services of the

State Bar are strictly limited to the technical, non-partisan areas of the administration of justice, practice, and procedure. The record does not show that the State Bar has in any way interjected itself into the arena of political action or stepped beyond the bounds delineated by the court.

D. *Appellant has no Constitutional Right of Silence, which would Prevent the Majority from Speaking in order to Protect an Asserted Freedom not to Dissent from the Majority*

Appellant cites many classic First Amendment cases involving suppression of speech or other restraints which abridge constitutional rights. He argues at length that his freedom of speech is just as much invaded when the majority of the bar expresses views with which he disagrees. This forces him to voice his dissent when he might prefer to remain silent, and also makes him speak against the louder voice of the majority. Thus, he claims his right not to speak or not to dissent is impaired.[73]

This asserted right not to dissent is a strange concept of freedom and one impossible to reconcile with the democratic tradition of protecting the rights of the majority as well as the minority. It would compel the group to remain silent in order that the minority need not dissent. The majority is gagged lest it express an opinion not acceptable to the minority, and thus the shield of the First Amendment is turned into a sword.

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[73]Appellant's Brief, 66-69.

The error and danger of such thinking are underscored in two opinions in the field of labor relations, dealing with union political activities. In the first of these, *United States v. C. I. O.*, 335 U. S. 106, a labor organization and its president were indicted under the Corrupt Practices Act for distributing a weekly periodical among its members urging them to vote for a particular candidate in a congressional election. The Court held the act did not forbid unions from circulating newspapers containing such campaign material among its own members in the regular course of business, and therefore the indictment did not state an offense. Justice Rutledge, in a concurring opinion joined in by Justices Black, Douglas, and Murphy, went further, and with respect to unions voicing political views in a campaign to other than its own members, declared that the law restricts the expression of "bloc sentiment" (143), and that First Amendment freedoms involve the right to hear as well as speak, on the part of the electorate or public in general as well as the individual (144). To the extent such right is curtailed the electorate is deprived of vital information, knowledge, and opinion (144). The effect of such restraint is one of "majority prohibition" because if the act is valid, "the accepted principle of majority rule which has become a bulwark, indeed perhaps the leading characteristic of collective activities is rejected in favor of atomized individual rule and action in matters of political advocacy" (147).

In the second case, *United States v. Auto Workers*, 352 U. S. 567, there was presented the question of union election activity aimed at the general public in the form of commercial television broadcasts in a campaign. The District

Court held the indictment did not state an offense, and this Court reversed but refrained from deciding on the constitutionality of the law. However, the constitutional issue was discussed at length in a dissenting opinion by Justice Douglas in which the Chief Justice and Justice Black joined. Justice Douglas dealt incisively with the problem of whether the majority of a group could be silenced in expressing its views because a minority might disagree, saying (596):

> ". . . there may be a minority of union members who are of a different political school than their leaders and who object to the use of their union dues to espouse one political view. This is a question that concerns the internal management of union affairs. To date, unions have operated under a rule of the majority. Perhaps minority rights need protection. But this way of doing it is, indeed, burning down the house to roast the pig. All union expenditures for poltical discourse are banned because a minority might object."

Protection of minority groups, he added, can be no excuse for denying First Amendment rights to the majority. "Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justification for withholding First Amendment rights from any group—labor or corporate" (597).

Similar sentiments were expressed in *De Mille v. American Federation of Radio Artists*, 31 Cal. 2d 139, 187 P. 2d 769, where the defendant union, operating on a union shop basis, levied an assessment of $1.00 per member for the purpose of opposing a referendum on the question of a state right-to-work law. De Mille, a member of the union,

objected on the ground that his constitutional freedoms were violated; but the court held there was no impairment of such rights, and this Court denied certiorari, 333 U. S. 876. In answer to plaintiff's assertion that payment of the assessment would be an expression on his part contrary to his convictions, the California Supreme Court pointed out that such payment "would not stamp his act as a personal endorsement of the declared view of the majority. Majority rule necessarily prevails in all constitutional government . . . else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishment thereof. In a government based on democratic principles the benefits as perceived by the majority prevail. . . ." 31 Cal. 2d 139, 150, 187 P. 2d 769, 776.

Thus, protection of the rights of the minority does not mean that the majority must refrain from speaking. The individual cannot impose his rule on the group by invoking a right not to speak. If there is any clash of opinion, it is for the individual to exercise his right to express dissent or remain silent.

The above cases deal with activity clearly political in nature. In the integrated bar and on the record in the instant case there is no political or partisan activity of any sort. A fortiori, there is even less substance to a claimed right not to dissent and less possibility of cause for dissent. In legislative services, for example, the bar is strictly confined to fields which are technical in nature and involve no political ideology.

The important thing is that the rights of the minority are fully protected, and the individual member of the bar

is free to speak his mind at any time. Lawyers are rarely at a loss for words or timid in uttering them, and an opportunity to express dissent is seldom overlooked. As long as each lawyer has the full freedom to express his own views, we think he cannot assert a right of silence which would deny the same freedom to the majority.

V.

THE VALIDITY OF THE INTEGRATED BAR UNDER THE FEDERAL CONSTITUTION HAS BEEN UPHELD IN EVERY CASE IN WHICH THE QUESTION HAS BEEN RAISED

With all of the diligent research which has gone into the appellant's brief, he has failed to come up with a single decision anywhere holding that the integrated bar violates the Constitution of the United States.

There is a multitude of decisions in the state courts sustaining validity in general and compulsory membership fees in particular. There is no conflict in the cases, and whenever the integrated bar has been challenged on constitutional grounds, its validity has been upheld. See annotations in 114 A. L. R. 161 and 151 A. L. R. 617.

Some of the more important cases are as follows:

(a) *Carpenter v. State Bar of California,* 211 Cal. 358, 360, 295 P. 23, 24. In this case suspension for nonpayment of dues was challenged, and the court said:

> ". . . The validity of the State Bar Act as a regulatory measure under the police power has been repeatedly upheld by this court. When that fact is con-

ceded, it follows as a matter of course that the reasonable expenses necessary to pay the costs of enforcement of the Act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues. Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960; Riley v. Chambers, 181 Cal. 589, 593, 185 P. 855, 9 A. L. R. 418; Goer v. Taylor, 51 N. D. 792, 200 N. W. 898."

(b) *Hernon v. State Bar of California*, 24 Cal. 2d 53, 64-65, 147 P. 2d 543, 549-550. Here the constitutionality of the integrated bar was raised in disciplinary proceedings, and the court reiterated its position that the State Bar Act is a valid regulatory measure under the police power.

(c) *Petition of Florida State Bar Ass'n.*, 40 S. 2d 902, 906-907. In this case integration by the court under its inherent power was upheld as a valid regulation of the bar, both as to the requirement of membership and payment of dues. The court pointed out that the state's police power could be exercised by the courts as well as by the legislature, and said at p. 907:

". . . We think the independence of the judiciary is something more than a tinkling cymbal; in fact, we think it means that in those matters which are purely and essentially judicial the judiciary may chart its course without interference from other departments. . . ."

(d) *In re Mundy*, 202 La. 41, 49-51, 11 S. 2d 398, 400-401. This case upholds integration and the compulsory payment of annual dues under the state's police power and under the court's inherent power to regulate the practice of law. "The levying of dues by the Bar Association in a

state which has adopted the so-called integrated bar is merely a form of levying a license tax upon the right to practice law. . . . To say that such license taxes, or occupation taxes, in the form of annual dues levied by the Association, cannot be enforced because they deprive the attorneys of their freedom either to join or not to join the Association, is the same as to deny the authority of the state to organize the members of the bar into an integrated bar, under the state's police power and under the inherent power of the Supreme Court to regulate the practice of law. On this subject see the line-up of decisions in the annotation of the case entitled *In re Integration of Nebraska State Bar Association*, 133 Neb. 283, 275 N. W. 265, 114 A. L. R. 151, loc. cit. 165."

(e) *Ayres v. Hadaway*, 303 Mich. 589, 596-598, 6 N. W. 2d 905, 907-908. The Michigan court held that the act creating the State Bar of Michigan does not violate the due process clause of the United States Constitution and cited cases from other jurisdictions to the effect that the power to regulate the conduct and qualifications of the court's officers does not depend upon constitutional or statutory grounds. Although the judicial power of the court has its origin in the constitution, the court nevertheless comes into existence with inherent powers. Such power includes the right to protect itself, to enable it to administer justice and make rules of practice.

(f) *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 200, 12 N. W. 2d 515, 518. Here the court held that the exercise of the Supreme Court's power to promulgate an order integrating the state bar would not violate the constitutional rights of any lawyer already admitted to

practice, since the practice of law is not a property right guaranteed or protected by either the state or federal Constitution. Rather it is a privilege conferred on the individual by the court to further the administration of justice. "Lawyers will agree that the administration of justice, the protection of the public, and the safeguarding of the rights guaranteed by the constitution outweigh the court's obligation to maintain the privilege accorded the individual lawyer in admitting him to the practice of law."

(g) *In re Integration of Nebraska State Bar Ass'n.*, 133 Neb. 283, 286-290, 275 N. W. 265, 266-268. This case contains a comprehensive discussion of the court's inherent power to integrate and regulate the bar and of the proposition that this power does not depend upon constitutional or statutory grounds.

(h) *In re Scott*, 53 Nev. 24, 39-40, 292 P. 291, 295. In its opinion here the court concluded that the State Bar Act violated neither the federal nor state Constitution irrespective of whether the practice of law is a privilege or a property right. The court pointed out that in so far as due process is concerned, provision is made for a full and complete hearing of all complaints lodged against a member of the bar; and for a review before the Board of Governors, coupled with a review by the Supreme Court. It also stated that the time had come in the administration of the law when attorneys who constitute an integral and indispensable unit in the administration of justice, should be organized as a body politic, with delegated police power subject to the control of the Supreme Court and the legislature for the benefit of the public welfare in a matter of great public concern.

(i) *In re Platz*, 60 Nev. 296, 302-309, 108 P. 2d 858, 862-864. Here it was held that the State Bar Act was not void as depriving attorneys of property without due process of law and that the State Bar had the right under the police power to collect state bar membership dues from attorneys. Also, it was concluded that the Act does not deprive attorneys of any vested property right or operate as a bill of attainder.

(j) *In re Gibson*, 35 N. Mex. 550, 557-563, 4 P. 2d 643, 647-650. The New Mexico court held that the State Bar Act violated neither the state nor federal Constitution. Among other things, it was pointed out that in so far as compulsion is concerned a member of the State Bar is privileged to vote but is not compelled to do so. It was argued that the penalty for nonpayment of dues denied the equal protection of the laws and resulted in deprivation of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. This contention was overruled, and it was held that the annual fee could be justified for the purpose of raising revenue or as purely a regulatory exaction.

(k) *Kelley v. State Bar of Oklahoma*, 148 Okla. 282, 282-283, 298 P. 623, 624. In this case it was held that whether or not the right to practice law is a property right, integration is a constitutional form of regulation. The court considered the State Bar to be an arm of the court, and that under the police power of the state and under the necessary power given to the court to perpetuate its existence the right to practice law is a matter subject to the court's regulation. It found nothing in the Act which would justify the court in holding it unconstitutional.

(1) *Integration of the Bar Case*, 244 Wis. 8, 44, 11 N. W. 2d 604, 620. After extended discussion the court concluded that integration "in no way violates the provisions of the Fourteenth Amendment to the Constitution of the United States. It deals with persons admitted to the Bar and all members of the Bar are treated exactly alike. The licensing of business, occupations, and professions has been sustained in innumerable cases. While but few of these cases deal with a fee imposed upon attorneys by order of the court the principle is the same as that which supports the imposition of a fee by the Legislature for similar purposes."

As one writer states:

> "It seems clear in the light of the decisions that all the objections heretofore raised as to the constitutionality of bar integration have now been settled. In every state in which questions as to the validity of these statutes have been raised, their constitutionality has been upheld."[7]

The only authority for the invalidity of any phase of bar integration is an Idaho case in which the bar statute was found to violate a *state* constitutional provision relating to the creation of corporations. *Jackson v. Gallet*, 39 Ida. 382, 228 P. 1068. However, the statute was amended to meet this difficulty, and the court subsequently held integration valid. *In re Edwards*, 45 Ida. 676, 266 P. 665.

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[7]Wicker, **Integrated Bars**, 21 Tenn. L. Rev. 708, 712 (1951); and see Wicker, **The Pros and Cons of an Integrated Bar**, 23 Tenn. L. Rev. 457, 459 (1954).

CONCLUSION

For the foregoing reasons, we believe the rules integrating the bar of Wisconsin violate none of the rights protected by the Fourteenth Amendment.

Any question here of freedom of association seems to have been settled explicitly by this Court in the *Hanson* case. It is difficult to perceive any constitutional basis for saying that it is valid to require all employees to belong to a labor organization but not valid to require all lawyers to belong to a bar organization, particularly when it is already mandatory for the latter to belong to the "bar" and submit to regulation as members of that group.

As to freedom of speech, the objection urged amounts to a denial of the right of the majority to express views with which appellant might disagree. The court below found that all legislative measures on which the bar took a position since integration dealt only with the administration of justice, court reform, and practice,—as authorized and limited by the integration rules. The record presents no evidence of any intrusion into the political sphere, nor of any infringement of appellant's right to express his own views at any time. If the State Bar should ever step beyond the bounds marked out by the rules or deny appellant any right to which he is entitled, he has an adequate remedy against such action.

All that is involved in this case is a moderate form of regulation by the Wisconsin Supreme Court, designed to provide democratic self-government for the whole bar and based upon the principle that all members should join in a common endeavor to improve the profession and its serv-

ices in aid of the judicial process. Long experience with the integrated bar in 27 of our states, as well as abroad, demonstrates its capabilities and its superiority over the voluntary form of organization. In Wisconsin its beneficial results to the profession and the public are already apparent; and the fears of those opposed to integration have not materialized.

The integrated bar imperils no constitutional rights. Instead, it offers a challenge and an opportunity to every lawyer to do his part in a collective effort toward making the profession a more effective instrument for improving the administration of justice, which is basic to the protection of all constitutional rights.

Therefore, it is respectfully submitted that the appeal should be dismissed and certiorari denied, or in the event this Court takes jurisdiction, that the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 200.

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF THE CUYAHOGA COUNTY BAR ASSOCIATION AMICUS CURIAE.

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BRIEF OF THE CUYAHOGA COUNTY BAR ASSOCIATION AMICUS CURIAE.

With the consent of both parties to this action, the Cuyahoga County Bar Association submits herewith its brief amicus curiae. In so doing, the Association supports the jurisdiction of this Court and urges the reversal of the judgment of the Supreme Court of Wisconsin.

The Cuyahoga County Bar Association maintains headquarters in the city of Cleveland, Ohio. It has been in existence as a duly incorporated bar association since 1928, and has for more than thirty years taken an active part in all matters relating to the administration of justice, not only in the city and county wherein its headquarters are maintained, but throughout the State of Ohio.

The Association represents a membership of approximately two thousand lawyers, and is believed to be the second largest county bar association in the United States.

The within cause involves basic and important questions of federal constitutional law, the determination of which will materially affect the members of the bar of

the State of Ohio, as well as members of the bar of every state.

SUMMARY OF ARGUMENT.

I.

The appellant has suffered a denial of due process of law, not only for the many reasons cited and documented in appellant's brief, but because, from the inherent nature of the issues presented, no determination of the issues has heretofore been made, or could have been made, by an impartial judicial tribunal, having the authority to render a decision in favor of the appellant.

(a) The appellee, Joseph D. Donohue, is only a pro forma defendant. His action in refusing to refund dues paid by the appellant was compelled by the action of the Supreme Court of Wisconsin promulgating the State Bar of Wisconsin.

(b) Although the Circuit Court of Fond du Lac County had jurisdiction to hear and to decide the case, it is doubtful that the court had even nominal authority to hold unconstitutional a rule of the Supreme Court of that state. Rules adopted by a state court of final jurisdiction effective throughout the state are binding upon all lower courts and may not properly be overthrown by them.

(c) Although the Supreme Court of Wisconsin afforded appellant a full hearing and consideration of the grounds advanced in opposition to the validity of the rule of that court, the nature of the judicial process is such that the members of that court were required to recognize an obligation to the court itself to uphold the validity of the rule which that court had solemnly adopted after careful study and the issuance of a published opinion. Determination of the issues of constitutionality of the rule by the members of such a judicial body under such circum-

stances did not and could not afford to the appellant an impartial judicial tribunal within the requirements of due process of law.

II.

The state bar rule automatically suspending the right of an attorney to practice his profession so long as he refuses, by virtue of simple non-payment of "dues," to associate himself unwillingly with other members of his profession in an involuntary organization of the bar, results in a deprivation of the lawyer's right to practice his profession without due process of law.

(a) Although many courts have on occasion loosely referred to the practice of law as a privilege, and authority to enter into that practice may perhaps be referred to as a privilege, nevertheless, one upon whom that privilege has been conferred and who has thereafter devoted his entire time and efforts to the practice of his profession, has acquired a right to continue therein, which may not be suspended or terminated other than by a procedure which fully complies with the requirements of due process of law.

(b) The right to continue in the practice of law may not be terminated or suspended by an arbitrary or summary application of a rule which bears no relationship to the fitness or qualifications of the lawyer to continue in his profession, and involves no conduct of the lawyer in his relationship to his clients or to the courts.

III.

Although a state court of last resort has the authority to govern admission into the practice of law, removal or suspension from the practice of law, and generally to adopt rules and regulations with respect to the practice of law, its authority does not extend to include the power to impose as a condition of the right to continue in the practice

of law the compulsory association of each lawyer in the state with all other lawyers for the avowed purpose of organizing the bar in a single association, nor does its authority include the power to impose, as a condition to the right to continue in the practice of law, the payment of annual dues to such association.

IV.

Judicial power is confined to the administration of justice in the courts and, with respect to a state court of last resort, supervisory administration and control over such judicial officers and agencies as have been created by the legislative authority of the state, and designated to assist in the administration of justice. Judicial power does not contemplate or include the authority to create a public agency, or the authority to compel the payment of funds to such an agency, or to regulate or supervise the expenditure of funds or the purposes for which such funds shall be expended by a public agency.

(a) If a "state bar" is to be regarded as a public agency, and if the funds paid to the state bar are to be regarded as public funds under the control of the state, the act of creating such an agency is not an act of judicial power but of legislative power and is beyond the authority of any court.

V.

It is repugnant to the principles of free speech and free association guaranteed by the United States Constitution to compel the association of one individual with others in a group, no matter what the nature or the purpose of that group or association may be.

(a) The device of compelling such association by invoking the authority of the state to require the payment of

dues to such association, is equally repugnant to the principles of free speech and free association even though, for obvious reasons, the state cannot compel active participation by an individual with other members of the association.

(b) It is an unconstitutional infringement of the personal liberty of an individual to compel him to associate himself with others in a group, particularly if he believes himself to be not in accord with the views of the majority, and thereby to compel him to be designated or characterized as a member of a dissenting minority.

ARGUMENT.

Due process of law requires the determination of a cause by an impartial judicial tribunal.

Because of the nature of the issues in this cause, such a determination can be had by the appellant only in this Court. This case was instituted in the Circuit Court of Fond du Lac County, Wisconsin. That court disposed of the case by sustaining a demurrer to the complaint. In so doing, the trial court reviewed the action of the Supreme Court of Wisconsin in adopting a rule which integrated the bar of the state, and quoted at length from the opinion of the Supreme Court of Wisconsin rendered in an ex parte proceeding entitled, In re Integration of the Bar.

The trial court concluded, as it would have been expected to conclude:

> "However, the subject matter of this litigation involves rules promulgated by the Supreme Court of Wisconsin, and the Supreme Court has exclusive jurisdiction with reference to the questions involved."

Such a conclusion was inevitable in the light of the fact that in all states rules promulgated by a court of last resort are binding upon the lower courts of the state. It

therefore follows that the issues in this case were never determined by the trial court.

The defendant, Joseph D. Donohue, is only a pro forma defendant in the case. It was not the voluntary act of that defendant which provoked the filing of the suit. The real defendant in the case is the Supreme Court of Wisconsin itself whose action in adopting the integrated bar rule brought about the factual situation giving rise to this lawsuit, and raised the constitutional issues for the impartial determination of which the suit was instituted.

It is conceivable that the same issues could have been raised in a suit filed in the appropriate federal district court, seeking to restrain the Supreme Court of Wisconsin from interfering with the lawful right of the plaintiff to continue in the practice of law.

When the members of a court are called upon to determine issues in a situation wherein, except for the form of the proceeding, they themselves might well have been placed in the position of defendants, can it then be maintained that the members of the court have no interest in the outcome of the case and are hearing and deciding the important issues involved as wholly impartial arbiters?

This situation has widespread significance involving the fundamental right of lawyers throughout the nation to challenge before an impartial judicial tribunal the validity under the Constitution of the United States of acts done, rules adopted and orders issued *ab initio* by a state court of last resort which affect their personal rights.

Particularly within the past fifteen years many state courts of last resort have undertaken to adopt and to promulgate rules governing the conduct of members of the bar, and the organization of the bar in the several states, the validity of which under the United States Constitution has been frequently, but unsuccessfully, challenged before

courts which have necessarily, by their own prior acts, prejudged the issue of validity.

In the state of Ohio, for example, the Supreme Court of Ohio on December 5, 1956, adopted a rule creating a Board of Commissioners on Grievances and Discipline, which was empowered to hear charges against members of the bar for alleged infractions of rules of ethics and conduct. Elaborate and detailed procedures were formulated by the court which, among other things, provided that the individuals, members of the Board of Commissioners, who actually presided over the hearings and received evidence and listened to witnesses, were selected not by the court but by the chairman of the board.

The most significant effect of this rule was to nullify a series of Ohio statutes, which had been in effect for more than one hundred years, providing entirely different proceedings and investing the trial courts of the state with jurisdiction which the rule of the Supreme Court abrogated.

The validity of this rule under the Constitution of the United States was challenged in the case of *Henry H. Pleasant vs. The Cleveland Bar Association*. The Supreme Court of Ohio upheld the validity of the rule, declaring that because it had inherent jurisdiction over disbarment proceedings, it could provide the procedure for determining those proceedings notwithstanding the nullification of long-existing statutes and the abrogation of the statutory jurisdiction of the trial courts.

The interest of the court in upholding the validity of its own rule is apparent from the language of its opinion, *Cleveland Bar Association vs. Pleasant*, 167 O. S. 325, 148 N. E. 2d 493, Petition for Writ of Certiorari denied, 358 U. S. 842, 79 Supreme Court, 33.

It is suggested that no determination by an impartial judicial tribunal has yet been had with respect to the validity of the rule of the Ohio Supreme Court, and that similar situations have arisen in cases throughout the country wherein the validity of an integrated bar rule adopted by a state court of final jurisdiction has been challenged. It is suggested that all decisions of such courts upholding the validity of such rules in adversary proceedings necessarily bear the imprint of their prejudged determination in a prior ex parte proceeding.

Admission to the practice of law, followed by the exercise of the authority conferred, vests the lawyer with something more than a mere privilege which may be suspended summarily by the operation of a rule of court or terminated without reference to the requirements of due process of law.

Statements may be found in many cases to the effect that the right to practice law is only a "privilege." Such an expression, for example, appears in an opinion cited in the appellee's brief in this case (p. 39), *In re Greer*, 52 Ariz. 385, 81 Pac. 2d 96, in which that court said:

> "It has always been considered as a privilege only bestowed upon certain persons primarily for the benefit of society and upon such terms and conditions as the state may fix. The final determination as to what these conditions are and who has satisfactorily complied therewith is and always has been in the courts before which the individual practices his profession * * *."

This bar association readily agrees that an attorney owes certain duties and responsibilities to the courts and to the public, and that conditions may be imposed upon an attorney's right to continue in the practice of law based

upon his fulfillment of his duties and responsibilities to the courts and to the public. These conditions are not, however, wholly without limitation and they must be imposed within the framework of the guarantees afforded to all persons by the Constitution of the United States.

Members of the bar are equally entitled to the protection of these guarantees, not only as individuals but in the practice of their profession. Courts which impose conditions upon the authority to continue in the practice of law are equally obligated to respect those constitutional guarantees. It is a loose and inaccurate statement to aver that the authority to continue in the practice of law is a mere privilege if that statement implies that a court has the power to suspend or to terminate that authority summarily by the automatic operation of a rule of court and without reference to the personal qualifications of the attorney to continue in practice, and in disregard of the procedures required by due process of law.

It is noted in 5 *A. J.*, p. 234, that:

> "The action of a court in exercising its power to declare a forfeiture of the privilege or franchise of an attorney is judicial in character * * *."

The words "privilege" and "franchise" are not synonymous, and the word "franchise" as employed in the text of American Jurisprudence more accurately describes the vested right of an attorney to continue in the practice of law provided he fully complies with the principles of legal ethics and maintains his honesty and integrity in his dealings with the public and with the courts.

It is not often that a court is called upon to declare that the right to continue in the practice of law is a property right, but it cannot be overlooked that this right is almost universally regarded as a property right by the

members of the bar. Regularly in bulletins of local and state bar associations will be found advertisements offering, for a consideration, to dispose of and to assign the rights to the practice of an attorney now deceased. The purchase and the transfer of such a practice is by no means an isolated act. There is implicit in such a transaction the property rights which are inherent in the practice which the attorney has acquired.

In a recent case, this Court has given recognition to this circumstance. In *Konigsberg vs. the State Bar of California*, 353 U. S. 252, 257, 77 Supreme Court 722, 725, referring to the action of the Committee of Bar Examiners of the State of California, in refusing the petitioner the right to attempt to become an attorney by taking the bar examination, this Court said:

> "While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases.
>
> "The Committee's action prevents him from earning a living by practicing law. *This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.*"

In the *Konigsberg* case, this Court recognized that an opportunity afforded to take a bar examination and to enter upon the practice of law is more than a mere privilege which can be denied to an individual for any reason which a bar examining committee or the state Supreme Court may regard as sufficient.

The condition which may be imposed upon an applicant seeking to take a bar examination must, as a result of the decision of this court in the *Konigsberg* case, comply with the requirements of due process of law. In that case, this court held:

Syl. 8—

"States may not exercise power to select their own bar in an arbitrary or discriminatory manner, or in such a way as to impinge upon the freedom of political expression or association."

Certainly there is all the more reason for asserting the legal principle that one who has already been admitted into the practice of law and who has devoted years of effort to building a practice, and who depends upon that practice for his very livelihood, cannot be deprived of his right to practice law as though it were a mere privilege summarily and arbitrarily to be suspended by a state Supreme Court for a mere nonpayment of dues to an involuntary association of lawyers.

Certainly there is all the more reason for asserting that it is only for reasons, and in accordance with procedures, which fulfill the requirements of due process of law, that a lawyer's right to continue in the practice of his profession may be suspended or terminated.

A court is not acting judicially and exceeds the limitations of its powers when it attempts to create a public agency and to compel citizens of the state, whether lawyers or not, to pay funds to such an agency for any purpose.

It is within the confines of the issues of this case to point out that due process of law protects the appellant from being compelled to pay to any public agency of the state of Wisconsin any money for any purpose unless he is required to do so by a branch of the state government exercising authority within the limitations imposed upon that particular branch of the government by the Constitution of the United States. Article IV, Sec. 4 of the Constitution of the United States, provides:

"The United States shall guarantee to every state in this Union a republican form of government * * *."

The legislative authority of the state is vested in a state Legislature or Assembly, and the judicial authority of the state is vested in the courts. Such form of government historically requires a separation of powers. Judicial power is confined to the administration of justice in the courts of the state.

Judicial power does not contemplate or include the authority to create a public agency which the legislative authority of the state has not seen fit to create. Judicial power does not contemplate or include the authority to compel any citizen of a state to pay money to a state agency for any purpose whatever whether that agency be under the supervision and control of the court or otherwise.

The authority to compel a citizen to pay money to a state agency whether it be in the form of taxes, assessments, license fees, dues, or otherwise, is an inherent part of the legislative authority of the state and is confined to that authority.

It is a euphemism to assert that simply because a state Supreme Court has supervisory authority over the lawyers and the practice of law within the state, and may discipline lawyers for infractions of the rules of ethics and conduct, that for the same reason and as a part of the same authority it has a right to create out of wholecloth a public agency which was previously nonexistent, and has a right to compel the lawyers of the state to pay funds into that agency as a condition of the right to continue the practice of their profession. This is both sophistry and a complete non sequitur.

It is as repugnant to the principles of free speech and free association guaranteed by the Constitution of the United States to compel the association of one individual with others in a group as it is to forbid such association.

The authorities stating and applying the constitutional principles guaranteeing to all citizens the right of free speech and free association have been well stated and covered in the brief of the appellant. One who is unwillingly compelled by the force of law to associate himself with others in any organization, is thereby forced into an involuntary association with other individuals belonging to the group, even though the law cannot, for obvious reasons, compel active participation in, or association with, the group's activities and functions.

It is no answer to say that the only compulsion arises from the forced payment of annual dues. The payment of these dues becomes obligatory only because the individual is required to be and to remain a member of the association. If he chooses to disassociate himself, he is no longer obligated to pay dues, but both acts are by force of the rule of the Supreme Court of Wisconsin, forced upon all members of the bar because the penalty for failing to become a member of the association and to pay dues is suspension from the practice of law. This is a penalty which this Court has recognized in the *Konigsberg* case as having consequences to an individual as grave and far-reaching as any criminal sanction or penalty.

The validity of laws forbidding the free right of association has frequently been called in question in passing upon the constitutionality of local so-called "suspicious person" ordinances. Such ordinances commonly or frequently prohibit association with persons who are "known criminals."

It is appropriate and directly pertinent to call the attention of this court to the principles enunciated in these cases. In the case of *City of St. Louis vs. Fitz*, 53 Mo. 582, the court held:

Syl. 2—

"The ordinance of the City of St. Louis prohibiting 'knowingly associating with persons having the reputation of being thieves and prostitutes, is void as invading the right of personal liberty.' "

In its opinion, the court said:

"However humble may be the citizen arrested under an ordinance prohibiting intercourse with such former criminals, his right to select his own company, so long as no actual breach of law occurs and no intended breach of law can be established, is sacred and as much under the protection of the state as though he moved in the more elevated spheres of society."

In a concurring opinion a justice of the Missouri Supreme Court declared:

"I hold the ordinance absolutely invalid on the broad ground that its direct effect is to invade and necessarily destroy one, at least, of those 'certain inalienable rights' of the citizen bestowed by the creator and guaranteed by the organic law, personal liberty. * * *. Any such attempted encroachments are usually justified on the specious plea of necessity. **Besides, the power to restrain certain associations must necessarily imply and embrace the power to compel such associations whenever those having the authority to prohibit shall thus determine.**"

In the case of *City of St. Louis vs. Roche*, 128 Mo. 541, 31 S. W. 915, the court declared:

"If it can be made a penal offense for a person to associate with those of his own choosing, however disreputable they may be, when not in furtherance

of some overt act of public indecency or the perpetration of some crime, *then it necessarily follows that by the same authority he may be compelled to associate with persons not of his own choosing. There is no difference in principle,* * * *.

"Our constitution and laws guaranteed to every citizen the right to go where and when he pleases and to associate with whom he pleases, exacting from him only that he conduct himself in a decent and orderly manner, that he disturb no one and that he interfere with the rights of no other citizen.

"In a case somewhat similar with respect to the rights of a citizen, the Supreme Court of Michigan said: 'Personal liberty which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion to go where one pleases and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens.' Pinkerton vs. Verberg, 78 Mich. 573."

In another case, *Ex parte Smith,* 135 Mo. 223, 36 S. W. 628, that court said:

"Certainly it stands to reason that if the Legislature, either state or municipal, may forbid one to associate with a certain class of persons with unsavory or malodorous reputation, by the same token it may dictate who the associates of anyone may be.

"*But, if the Legislature may dictate who our associates may be, then what becomes of the constitutional protection to personal liberty,* which Blackstone says 'consists of the power of locomotion, of changing situation or moving one's presence to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law'?

"Obviously there is no difference in point of legal principle between a legislative or a municipal act which forbids certain associations and one which com-

> mands certain associations. We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be."

The federal guarantees of personal liberty and the prohibition of the Constitution of the United States against their infringement by the states, are equally applicable to all branches of the state government; and the principles above set forth are equally applicable to the courts as they are to the Legislatures.

Referring to the same rights and liberties, the Supreme Court of Michigan, in the case of *Pinkerton vs. Verberg*, 78 Mich. 573, cited by the Supreme Court of Missouri in the case of *City of St. Louis vs. Roche*, *supra*, page 14, declared:

> "These are rights which existed long before our constitution and we have taken just pride in their maintenance, making them a part of the fundamental law of the land."

It is repugnant to the principles of free speech and free association to compel one to associate himself with others in a group in which he will be, or believes that he will come to be, characterized as a member of a dissenting minority.

One of the cardinal values of the right of free association is the right to refrain from joining or associating oneself with any group in which one would be, or believes that one would come to be, characterized as a member of a dissenting minority. The right of free association guarantees that no one shall be forced to join with others in an association with whose views, opinions or objectives one disagrees.

The democratic principle of majority rule in any group or association becomes a snare and a delusion for any in-

dividual who, by force of law, is required to become a member of that association but disagrees with its principles, its methods or its objectives.

To assert that all lawyers, because they are members of the legal profession, entertain the same views with reference to the law, believe in the same principles with reference to procedure and enforcement, and entertain the same objectives in relation to the administration of justice, is to run counter to facts of which every court may well take judicial notice.

As this court noted in its opinion in the case of *Carter vs. Carter Coal Co.*, 298 U. S. 238, 311, 56 Supreme Court 855, 872:

> "To 'accept' in these circumstances is not to exercise a choice, but to surrender to force."

There is an important characteristic of the legal profession which distinguishes it from all other professions. This characteristic sometimes persuades, frequently compels, but always justifies, that the interest of the lawyer in the solution of numerous problems pertaining to proposed legislation, rules of court, procedure in the administration of justice and other related matters, be identified with the interest of his clientele. The attitude of a lawyer concerning these matters will very largely be determined by the effect which such legislation, such procedure, such rules, will have upon the clientele which the lawyer serves.

Academically, a lawyer may have an interest in such matters independent of the interest of his clientele. In practice, a lawyer will support that which promotes the interest of his clientele and will oppose that which will result in a disadvantage to his clients.

This identification of a lawyer with the interests of his clients is traditional and historic. It is widely recognized. It is a fallacy to assert that the profession as a whole may

be expected to take a stand on proposed legislation or any other subject dealing with the administration of justice which can be presented to the public as representative of anything more than the views of those lawyers the interest of whose clientele will be promoted thereby.

In its opinion in this case, the Supreme Court of Wisconsin (jurisdictional statement p. 9a) declared:

> "We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the Legislature are entitled to know how the profession as a whole stands on such type of proposed legislation."

To build an integrated bar on the basis of such an assertion is to erect a house on a foundation of straw. In the face of this situation, which is a demonstrable fact, one cannot help be given pause concerning the freedom of thought and expression which is extended with one hand by the Supreme Court of Wisconsin to the integrated bar of state, but immediately thereafter threatened with the exposed fist of the other hand. (Jurisdictional statement p. 9a):

> "Insofar as it confines such activities to those authorized by the rules and by-laws, this court will not interfere or in any manner seek to control or censor the action taken, or to substitute its judgment for that of the membership of the State Bar."

But (p. 10a),

> "However, as we pointed out in our opinion in the 1958 In re Integration of the Bar case, this court will exercise its inherent power to take remedial action should the state bar engage in an activity not author-

ized by the rules and by-laws and not in keeping with the stated objectives for which it was created."

These elements become more than merely a matter of policy or discretion on the part of a state Supreme Court when it is considered that the principles stated are to be applied to an association which all lawyers are *compelled* to join. We believe that it is not in consonance with the guarantees of personal liberty or with due process of law that one be compelled to become a member of an association so bound and circumscribed, and that this objective is no justification for invading the individual liberties of the members of the bar by compelling them to belong to a single state-wide organization.

CONCLUSION.

The world has long since recognized, with Lord Acton, that "power tends to corrupt and absolute power corrupts absolutely."

The power of the Supreme Court of Wisconsin has been called in question in this case. Its exercise is challenged as an invasion of due process of law and of the personal liberties guaranteed by the Constitution of the United States. An objective and impartial resolution of this challenge by the Supreme Court of Wisconsin would have been contrary to human nature. Unless this Court accepts jurisdiction of this cause and circumscribes the authority of the Supreme Court of Wisconsin within the proper limitations placed upon that authority by the Constitution of the United States, the power of the Supreme Court of Wisconsin becomes absolute.

In the same manner and to the same degree the power of the Supreme Court of Ohio in creating a Board of Commissioners and nullifying the century old jurisdic-

tion of the trial courts of the state of Ohio, has to this day remained absolute.

Surely it is ironic that the profession which has been charged with the responsibility of protecting the rights and liberties of all of the citizens of this land, remains helpless to protect the rights and liberties of the individual members of the bar in the face of such absolute power, to which no other persons in the land are subject.

The Cuyahoga County Bar Association urges the jurisdiction of this Court in this case and the reversal of the judgment of the Supreme Court of Wisconsin.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 200.—October Term, 1960.

Trayton L. Lathrop, Appellant, v. Joseph D. Donohue.	On Appeal From the Supreme Court of the State of Wisconsin.

[June 19, 1961.]

Mr. Justice Brennan announced the judgment of the Court and an opinion in which The Chief Justice, Mr. Justice Clark and Mr. Justice Stewart join.

The Wisconsin Supreme Court integrated the Wisconsin Bar by an order which created "The State Bar of Wisconsin" on January 1, 1957, under Rules and Bylaws promulgated by the court. *In re Integration of the Bar*, 273 Wis. 281; *id.*, p. vii. The order originally was effective for a two-year trial period, but in 1958 was continued indefinitely. *In re Integration of the Bar*, 5 Wis. 2d 618. Alleging that the "rules and by-laws required the plaintiff to enroll in the State Bar of Wisconsin and to pay dues to the treasurer of the State Bar of Wisconsin on the penalty of being deprived of his livelihood as a practicing lawyer, if he should fail to do so," the appellant, a Wisconsin lawyer, brought this action in the Circuit Court of Dane County for the refund of $15 annual dues for 1959 paid by him under protest to appellee, the Treasurer of the State Bar. He attached to his complaint a copy of the letter with which he had enclosed his check for the dues. He stated in the letter that he paid under protest because "I do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities. . . . A major portion of the activities of the State Bar as prescribed by the Supreme Court of Wisconsin are of a political and propaganda nature." His complaint alleges more specifically that the State Bar

promotes "law reform" and "makes and opposes proposals for changes in . . . laws and constitutional provisions and argues to legislative bodies and their committees and to the lawyers and to the people with respect to the adoption of changes in . . . codes, laws and constitutional provisions." He alleges further that in the course of this activity "the State Bar of Wisconsin has used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to plaintiff's convictions and beliefs." His complaint concludes: "The plaintiff bases this action on his claim that the defendant has unjustly received, held, and disposed of funds of the plaintiff in the amount of $15.00, which to the knowledge of the defendant were paid to the defendant by the plaintiff unwillingly and under coercion, and that such coercion was and is entailed in the rules and by-laws of the State Bar of Wisconsin continued in effect by the aforesaid order of the Supreme Court of the State of Wisconsin . . . ; and the said order insofar as it coerces the plaintiff to support the State Bar of Wisconsin, is unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States . . . ."

The appellee demurred to the complaint on the ground, among others,[1] that it failed to state a cause of action. The demurrer was sustained and the complaint was dismissed. The Supreme Court of Wisconsin, on appeal, stated that the Circuit Court was without jurisdiction to determine the questions raised by the complaint. However, treating the case as if originally and properly brought in the Supreme Court, the court considered appellant's constitutional claims, not only on the allegations

[1] He also demurred on grounds that the Circuit Court had no jurisdiction of the subject matter because exclusive jurisdiction was vested in the Supreme Court and that there was a defect of parties because the State Bar was not made a defendant.

of the complaint, but also upon the facts, of which it took judicial notice, as to its own actions leading up to the challenged order, and as to all activities, including legislative activities, of the State Bar since its creation.[2] The judgment of the Circuit Court dismissing the complaint was affirmed. 10 Wis. 2d 230. The Supreme Court held that the requirement that appellant be an enrolled dues-paying member of the State Bar did not abridge his rights of freedom of association, and also that his rights to free speech were not violated because the State Bar used his money to support legislation with which he disagreed.

An appeal was brought here by appellant under 28 U. S. C. § 1257 (2), which authorizes our review of a final judgment rendered by the highest court of a State "By appeal, where is drawn in question the validity of a [state] statute . . . ." We postponed to the hearing on the merits the question whether the order continuing the State Bar indefinitely under the Rules and Bylaws is a "statute" for the purposes of appeal under § 1257 (2). 364 U. S. 810.

We think that the order is "a statute" for the purposes of § 1257 (2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court." *Williams* v. *Bruffy*, 96 U. S. 176, 183. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the

[2] We also consider the case on this expanded record. Appellant raises no objection, and indeed urges us to do so.

present § 1257 (2): ". . . the jurisdictional provision uses the words 'a statute of any State' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction." *King Manufacturing Co.* v. *City Council*, 277 U. S. 100, 104–105. Thus this Court has upheld jurisdiction on appeal of challenges to municipal ordinances, *e. g.*, *King Manufacturing Co.* v. *City Council, supra; Jamison* v. *Texas*, 318 U. S. 413, certain types of orders of state regulatory commissions, *e. g.*, *Lake Erie & Western R. Co.* v. *State Public Utilities Comm'n*, 249 U. S. 422, and some orders of other state agencies, *e. g.*, *Hamilton* v. *Regents*, 293 U. S. 245, 257–258. It is true that in these cases the state agency the action of which was called in question was exercising authority delegated to it by the legislature. However, this fact was not determinative, but was merely relevant to the character of the State's action. The absence of such a delegation does not preclude consideration of the exercise of authority as a statute.

We are satisfied that this appeal is from an act legislative in nature and within § 1257 (2). Integration of the Bar was effected through an interplay of action by the legislature and the court directed to fashioning a policy for the organization of the legal profession. The Wisconsin Legislature initiated the movement for integration of the Bar in 1943 when it passed the statute, chapter 315 of the Wisconsin Laws for that year, now Wis. Rev. Stat. § 256.31, providing:

> "(1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.
>
> "(2) The supreme court by appropriate orders shall provide for the organization and government of

> the association and shall define the rights, obligations and conditions of membership therein, to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

The State Supreme Court held that this statute was not binding upon it because "[t]he power to integrate the bar is an incident to the exercise of the judicial power . . . ." *Integration of Bar Case*, 244 Wis. 8, 40. The court twice refused to order integration, 244 Wis. 8, 249 Wis. 523, before taking the actions called in question on this appeal, 273 Wis. 281, 5 Wis. 2d 618. Nevertheless, the court in rejecting the first petition, 244 Wis., at pp. 51–52, recognized that its exercise of the power to order integration of the Bar would not be adjudicatory, but an action in accord with and in implementation of the legislative declaration of public policy.[3] The court said:

> "It is obvious that whether the general welfare requires that the bar be treated as a corporate body is a matter for the consideration of the legisla-

[3] The court's action was in response to a petition for "integration in the manner described" in Wis. Rev. Stats. § 256.31. Wis. Bar Bull., Apr. 1956, p. 21. The resolution of the House of Governors of the Wisconsin Bar Association leading to the filing of the petition referred to "integration pursuant to the provisions of Section 256.31 of the Wisconsin Statutes." *Id.*, p. 52. In many other States integration was initially accomplished either entirely by the legislature or by a combination of legislative and judicial action. See N. D. Laws 1921, c. 25; Ala. Laws 1923, No. 132; Idaho Laws 1923, c. 211; N. M. Laws 1925, c. 100; Cal. Stat. 1927, c. 34; Nev. Stat. 1928, c. 13; Okla. Laws 1929, c. 264; Utah Laws 1931, c. 48; S. D. Laws 1931, c. 84; Ariz. Laws 1933, c. 66; Wash. Laws 1933, c. 94; N. C. Laws 1933, c. 210; La. Acts 1934, 2d Extra Sess., No. 10; Ky. Acts 1934, c. 3; Ore. Laws 1935, c. 28; Mich. Acts 1935, No. 58; Va. Acts 1938, c. 410; Tex. Gen. Laws 1939, p. 64; W. Va. Acts 1945, c. 44; Alaska Laws 1955, c. 196.

> ture. . . . While the legislature has no constitutional power to compel the court to act or, if it acts, to act in a particular way in the discharge of the judicial function, it may nevertheless with propriety, and in the exercise of its power and the discharge of its duty, declare itself upon questions relating to the general welfare which includes the integration of the bar. The court, as has been exemplified during the entire history of the state, will respect such declarations and, as already indicated, adopt them so far as they do not embarrass the court or impair its constitutional functions."

Integration of the Bar in Wisconsin bore no resemblance to adjudication. The State Supreme Court's action disposed of no litigation between parties. Rather the court sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future. Cf. *Hamilton* v. *Regents, supra*, p. 258; *King Manufacturing Co.* v. *City Council, supra*, p. 104. As such, the action had the characteristics of legislation. We conclude that the appeal is cognizable under § 1257 (2). We therefore proceed to the consideration of the merits.

The core of appellant's argument is that he cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation.[4] But his compulsory enrollment imposes only

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[4] Appellant's notice of appeal presents the following question for our review:

"Do the orders and rules of the Supreme Court of the State of Wisconsin . . . and the rules and by-laws which were promulgated

the duty to pay dues.[5] The Supreme Court of Wisconsin so interpreted its order and its interpretation is of course binding on us. The court said: "The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year." 10 Wis. 2d, at p. 237.[6]

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thereby deprive the appellant . . . of his rights of freedom of association, assembly, speech, press, conscience and thought, or of his liberty or property without due process of law or deny to him equal protection of the law or otherwise deprive him of rights under the Fourteenth Amendment of the Constitution of the United States by compelling him, as a condition to his right to continue to practice law in the State of Wisconsin, to be a member of and financially support an association of attorneys known as the State Bar of Wisconsin, which association . . . among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion; and, therefore, are said orders, rules and by-laws, insofar as they coerce the appellant to be a member of and support said association, invalid on the ground that they are repugnant to the Constitution of the United States?"

[5] The rules limit the maximum permissible dues to $20 a year.

[6] A member suspended for nonpayment of dues may secure automatic reinstatement, so long as his dues are not in arrearage for three or more years, by making full payment of the amount and paying an additional $5 as a penalty. No other condition on acquiring or retaining membership is imposed by the rules or bylaws. Although the State Bar participates in the investigation of complaints of misconduct, see pp. 8–11, *infra*, final power to disbar or otherwise discipline any member resides in the Supreme Court.

The rules also make the canons of ethics of the American Bar Association, as modified or supplemented by the Supreme Court of Wisconsin, "the standards governing the practice of law in this state." But appellant makes no claim that the State lacks power to impose on him a duty to abide by these canons.

We therefore are confronted, as we were in *Railway Employees Department* v. *Hanson*, 351 U. S. 225, only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect. Cf. *International Association of Machinists* v. *Street*, decided today, pp. 7–8.

A review of the activities of the State Bar authorized under the Rules and Bylaws is necessary to decision. The purposes of the organization are stated as follows in Rule 1, § 2: "to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged." To achieve these purposes standing committees and sections are established.[7] The Rules also assign the organization

[7] The committees and their assigned functions are as follows:

"*Legal education and bar admissions.*—This committee shall make continuing studies of the curricula and teaching methods employed in law schools, and of standards and methods employed in determining the qualifications of applicants for admission to the bar; and whenever requested by the State Bar commissioners shall assist in the investigation of the qualifications of persons seeking admission to the bar.

"*Post-graduate education.*—This committee shall formulate and promote programs designed to afford to the members of the State Bar suitable opportunities for acquiring additional professional knowledge, training, and skill, through publications, lectures, and

a major role in the State's procedures for the discipline of members of the bar for unethical conduct. A Committee on Grievances is provided for each of the nine districts into which the State is divided. Each com-

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discussions at regional meetings of association members and law institutes, and through correspondence course study.

"*Administration of justice.*—This committee shall study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.

"*Judicial selection.*—This committee shall study and collect information pertaining to judicial selection, tenure, and compensation, including retirement pensions, and shall report from time to time to the association with respect thereto.

"*Professional ethics.*—This committee shall formulate and recommend standards and methods for the effective enforcement of high standards of ethics and conduct in the practice of law; shall consider the Canons of Ethics of the legal profession and the observance thereof, and shall make recommendations for appropriate amendments thereto. The committee shall have authority to express opinions regarding proper professional conduct, upon written request of any member or officer of the State Bar.

"*Public services.*—This committee shall prepare and present to the board of governors plans for advancing public acceptance of the objects and purposes of the association; and shall have responsibility for the execution of such plans as are approved by the board of governors. Such plans shall include arrangements for disseminating information of interest to all the public in relation to the functions of the departments of government, the judicial system and the bar; and to that end the committee may operate a speakers' bureau and employ the facilities of the public press and other channels of public communications.

"*Interprofessional and business relations.*—It shall be the duty of this committee to serve as a liaison agency between the legal profession and other professions and groups with whom the bar is in contact in order to interpret to such professions and groups the proper scope of the practice of law.

"*Legislation.*—This committee shall study all proposals submitted

mittee receives and investigates complaints of alleged misconduct of lawyers within its district. Each committee also investigates and processes petitions for reinstatement of lawyers and petitions for late enrollment in

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to the Wisconsin legislature or the congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals.

"*Legal aid.*—This committee shall promote the establishment and efficient maintenance of legal aid organizations equipped to provide free legal services to those unable to pay for such service; shall study the administration of justice as it affects persons in the low income groups; and shall study and report on methods of making legal service more readily available to persons of moderate means, and shall encourage and assist local bar associations in accomplishing this purpose.

"*Unauthorized practice of the law.*—This committee shall keep itself and the association informed with respect to the unauthorized practice of law by laymen and by agencies, and the participation of members of the bar in such activities, and concerning methods for the prevention thereof. The committee shall seek the elimination of such unauthorized practice and participation therein on the part of members of the bar, by such action and methods as may be appropriate for that purpose.

"*State Bar Bulletin.*—This committee shall assist and advise the officers of the association and the board of governors in matters pertaining to the production and publication of the *Wisconsin State Bar Bulletin*, the *Wisbar Letter*, the *Supreme Court Calendar Service* and such other periodical publications of the State Bar as may be authorized by the board of governors from time to time.

"*State Grievance Committee.*—This committee shall consist of the chairmen of the district grievance committees, who shall meet at least quarterly and whose duties shall be to exchange information as to problems arising under the grievance procedure, to discuss and adopt uniform procedures and standards under Rule 10 [relating to grievances] and to make recommendations to the Board of Governors for improvements in the procedures under Rule 10 and for other matters consistent with their organization." 273 Wis. xxxiii–xxxv; Supplement, Wis. Bar Bull., Aug. 1960.

Sections have been created in the areas of corporation and business law, family law, role of house counsel, insurance, negligence and

the State Bar of lawyers who fail to enroll within a designated period after becoming eligible to enroll.

The State Legislature and the State Supreme Court have informed us of the public interest sought to be served by the integration of the Bar. The statute states its desirability "to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice." This theme is echoed in the several Supreme Court opinions. The first opinion after the passage of the statute noted the "widespread general recognition of the fact that the conduct of the bar is a matter of general public interest and concern." 244 Wis. 8, 16. But the court's examination at that time of existing procedures governing admission and discipline of lawyers and the prevention of the unauthorized practice of the law persuaded the court that the public interest was being adequately served without integration. The same conclusion was reached when the matter was reviewed again in 1946. At that time, in addition to reviewing the desirability of integration in the context of the problems of admission and discipline, the court considered its utility in other fields. The matter of post-law school or post-admission education of lawyers was one of these. The court believed, however, that while an educational program was a proper objective, the one proposed was "nebulous in outline and probably expensive in execution." 249 Wis. 523, 530. The court also observed, "There are doubtless many other useful activities for which dues might properly be used, but what they are does not occur to us and no particular one seems to press for action." *Id.*, p. 530.

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workmen's compensation law, labor relations law, military law, real property, probate and trust law, taxation, government law, protection of individual rights against misuse of powers of government, patent, trademark and copyright law, and criminal law.

The court concluded in 1956, however, that integration might serve the public interest and should be given a two-year trial.[8] It decided to "require the bar to act as a unit to promote high standards of practice and the economical and speedy enforcement of legal rights," 273 Wis. 281, 283, because it had come to the conclusion that efforts to accomplish these ends in the public interest through voluntary association had not been effective. "[T]oo many lawyers have refrained or refused to join, . . . membership in the voluntary association has become static, and . . . a substantial minority of the lawyers in the state are not associated with the State Bar Association." *Id.*, p. 283. When the order was extended indefinitely in 1958 the action was expressly grounded on the finding that, "Members of the legal profession by their admission to the bar become an important part of [the] process [of administering justice] . . . . An independent, active, and intelligent bar is necessary to the efficient administration of justice by the courts." 5 Wis. 2d 618, 622.

The appellant attacks the power of the State to achieve these goals through integration on the ground that because of its legislative activities, the State Bar partakes of the character of a political party. But on their face the purposes and the designated activities of the State

[8] The court said: "We feel . . . that integration of the bar should be tried. The results thereof will be what the bar and the court make of it. If integration does not work, this court can change the rules to meet any situation that arises or it can abandon the plan." *In re Integration of the Bar*, 273 Wis. 281, 285. "[The rules and by-laws] cannot be taken as the last word, and . . . experience in operating under them may disclose imperfections, and particulars in which they should be changed. The integrated bar itself is an experiment in Wisconsin, and like all new enterprises may be expected to need adaptation to conditions and circumstances not yet clearly foreseen." *Id.*, p. ix.

Bar hardly justify this characterization. The inclusion among its purposes that it be a forum for a "discussion of . . . law reform" and active in safeguarding the "proper professional interests of the members of the bar," in unspecified ways, does not support it. Only two of the 12 committees, Administration of Justice, and Legislation, are expressly directed to concern themselves in a substantial way with legislation. Authority granted the other committees directs them to deal largely with matters which appear to be wholly outside the political process and to concern the internal affairs of the profession.

We do not understand the appellant to contend that the State Bar is a sham organization deliberately designed to further a program of political action. Nor would such a contention find support in this record. Legislative activity is carried on under a statement of policy which followed the recommendations of a former president of the voluntary Wisconsin Bar Association, Alfred La France. He recommended that the legislative activity of the State Bar should have two distinct aspects: (1) "the field of legislative reporting or the dissemination of information concerning legislative proposals. . . . This is a service-information function that is both useful to the general membership and to the local bar associations" and (2) "promotional or positive legislative activity." As to the latter he advised that "the rule of substantial unanimity should be observed. Unless the lawyers of Wisconsin are substantially for or against a proposal, the State Bar should neither support nor oppose the proposal." Wis. Bar Bull., Aug. 1957, pp. 41–42. "We must remember that we are an integrated Bar, that the views of the minority must be given along with the views of the majority where unanimity does not appear. The State Bar represents all of the lawyers of this state and in that capacity we must safeguard the interests of all."

Id., p. 44. The rules of policy and procedure for legislative activity follows these recommendations.[9]

Under its charter of legislative action, the State Bar has participated in political activities in these principal categories:

(1.) its executive director is registered as a lobbyist in accordance with state law. For the legis-

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[9] The policy provides:

1. "The State Bar, through action of its Board of Governors, will initiate legislation only on such matters as it believes to be of general professional interest. No legislation will be sponsored unless and until the Board is satisfied that the recommendation represents the consensus and the best composite judgment of the legal profession of this state, and that the proposed legislation is meritorious and in the public interest. The text of all proposed legislation shall be carefully prepared and considered and the counsel of the experts in the field involved will be sought wherever possible."

2. Power to make the final determination of the policy of the State Bar toward specific legislative proposals is lodged in the Board of Governors.

3. "Where it is obvious that the membership of the Bar is of a substantially divided opinion, the Board of Governors shall take no definite position;" but in any such case the Board is empowered to report its vote to the Legislature as a reflection of the diverse views of the members.

4. The Board may delegate its power to take a position on legislative matters to the Committee on Legislation, the president of the State Bar, or the legislative counsel.

5. Between Board meetings, the Executive Committee may exercise all of the Board's powers with respect to legislation.

6. The Board shall designate a legislative counsel, to be registered as a lobbyist in accordance with Wisconsin law. His task is to manage legislative activities, coordinating the work of sections and committees interested in legislative proposals with the activities of the Board, Executive Committee, and Committee on Legislation; he is also directed to screen all legislative proposals and refer those of special interest to the appropriate section or committee for study and recommendation.

7. The Committee on Legislation is empowered to designate persons to appear before legislative committees and arrange for their appearance.

[*Footnote 9 continued on p. 15.*]

lative session 1959–1960, the State Bar listed a $1,400 lobbying expense; this was a percentage of the salary of the executive director, based on an estimate of the time he spent in seeking to influence legislation, amounting to 5% of his salary for the two years. The

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8. When a section or committee sponsors legislation with the aproval of the Board, section officers or the committee chairman may appear before the legislature in its name, or request the legislative counsel to appear.

9. "During the session of the Legislature all sections and committees of the State Bar are expected to stand ready to (a) Participate in explaining the bills recommended or opposed by the State Bar to the committees of the Legislature to whom they are referred; (b) Prepare explanatory material relative to any bill about which a question has arisen since its introduction; (c) Examine all bills advocated by others that would affect the courts, the judiciary, the legal profession, or the administration of justice in any particular, or that would make any changes in the substantive law, and keep the Board of Governors and the Executive Committee fully informed so that ill-advised bills can be opposed and meritorious bills can be supported. Committees of the Legislature should be encouraged to request the State Bar to study and to report its recommendations concerning all bills of this category."

10. The State Bar staff is directed to cooperate with all sections, committees, individual members, and local bar associations desiring to have bills drafted for introduction into the legislature.

11. To facilitate widespread study of legislative proposals, the State Bar shall issue a weekly legislative bulletin to officers, members of the Board of Governors and the Executive Committee, section and committee chairmen, presidents and secretaries of all local bar associations, judges, and other persons as directed by the Executive Committee.

12. Local bar associations are encouraged to take such action on legislation as they deem appropriate and forward their recommendations to the State Bar for consideration. Board of Governors Minutes, June 12, 1957.

By resolution in 1959 it was further provided that a committee or section may present its views on legislation without approval of the Board of Governors. But in so doing it must state that the position is that of the group or its officers, not that of the State Bar. Board of Governors Minutes, Feb. 18, 1959.

registration statement signed by the then president of the State Bar added the explanatory note: "His activities as a lobbyist on behalf of the State Bar are incidental to his general work and occupy only a small portion of his time."

(2) The State Bar, through its Board of Governors or Executive Committee, has taken a formal position with respect to a number of questions of legislative policy. These have included such subjects as an increase in the salaries of State Supreme Court justices; making attorneys notaries public; amending the Federal Career Compensation Act to apply to attorneys employed with the Armed Forces the same provisions for special pay and promotion available to members of other professions; improving pay scales of attorneys in state service; court reorganization; extending personal jurisdiction over nonresidents; allowing the recording of unwitnessed conveyances; use of deceased partners' names in firm names; revision of the law governing federal tax liens; law clerks for State Supreme Court justices; curtesy and dower; securities transfers by fiduciaries; jurisdiction of county courts over the administration of *inter vivos* trusts; special appropriations for research for the State Legislative Council.

(3) The standing committees, particularly the Committees on Legislation and Administration of Justice, and the sections have devoted considerable time to the study of legislation, the formulation of recommendations, and the support of various proposals. For example, the president reported in 1960 that the Committee on Legislation "has been extremely busy, and through its efforts in cooperation with other interested agencies has been instrumental in securing the passage of the Court Reorganization bill, the bill of the Judicial Council expanding per-

sonal jurisdiction, and at this recently resumed session a bill providing clerks for our Supreme Court, and other bills of importance to the administration of justice." Wis. Bar Bull., Aug. 1960, p. 41. See also *id.*, June 1959, pp. 64–65. A new subcommittee, on federal legislation, was set up by this committee following a study which found need for such a group "to deal with federal legislation affecting the practice of law, or lawyers as a class, or the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals, or creation of new Federal courts or judgeships affecting this state, and comparable subjects . . . ." Board of Governors Minutes, Dec. 11, 1959. Furthermore, legislative recommendations and activities have not been confined to those standing committees with the express function in the by-laws of considering legislative proposals. See, *e. g.*, Report of the Committee on Legal Aid, Wis. Bar Bull., June 1960, p. 61; Report of the Committee on Legal Aid, *id.*, June 1959, pp. 61–62. Many of the positions on legislation taken on behalf of the State Bar by the Board of Governors or the Executive Committee have also followed studies and recommendations by the sections. See, *e. g.*, Report of the Real Property, Probate and Trust Law Section, Wis. Bar Bull., June 1960, p. 51; Report of the Corporation and Business Law Section, *id.*, p. 56.

(4) A number of special committees have been constituted, either *ad hoc* to consider particular legislative proposals, or to perform continuing functions which may involve the consideration of legislation. Thus special committees have considered such subjects as extension of personal jurisdiction over nonresidents, law clerks for State Supreme Court justices, and revision of the federal tax lien laws. The Special Committee on World Peace through Law,

which has encouraged the formation of similar committees on the local level, has sponsored debates on subjects such as the repeal of the Connally reservation, believing that "the general knowledge of laymen as well as of lawyers concerning the possibility of world peace through law is limited and requires a constant program of education and discussion." Wis. Bar Bull., June 1960, p. 54.

(5) The Wisconsin Bar Bulletin, sent to each member, prints articles suggesting changes in state and federal law. And other publications of the State Bar deal with the progress of legislation.

But it seems plain that legislative activity is not the major activity of the State Bar. The activities without apparent political coloration are many. The Supreme Court provided in an appendix to the opinion below, "an analysis of [State Bar] . . . activities and the public purpose served thereby." 10 Wis. 2d, at p. 244. The court found that "The most extensive activities of the State Bar are those directed toward postgraduate education of lawyers," and that "Postgraduate education of lawyers is in the public interest because it promotes the competency of lawyers to handle the legal matters entrusted to them by those of the general public who employ them." 10 Wis. 2d, at p. 246.[10] It found that the State Bar's parti-

[10] The statewide and regional meetings, the court found, are largely devoted "to the delivery of papers on technical legal subjects of an instructive nature." 10 Wis. 2d, at p. 246. The sections are particularly active in this regard. As a former president of the State Bar described their role: "The sections provide a special place where members with interest in particular fields of law may serve on committees and receive assistance and training in such fields. Moreover, the sections provide their own programs at each Annual and Midwinter meeting largely of a very practical and educational nature." Wis. Bar Bull., Aug. 1958, p. 71. See, *e. g.*, Report of Corporation and Business Law Section, *id.*, June 1960, p. 56; Report of Labor Law

cipation in the handling of grievances improved the efficiency and effectiveness of this work.[11] It found that the public interest was furthered by the Committee on Unauthorized Practice of Law which was carrying on "a constant program since numerous trades and occupations keep expanding their services and frequently start offering services which constitutue the practice of the law." 10 Wis. 2d, at p. 248.[12] The court also concluded that the

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Section, *id.*, p. 60. For example, the Taxation Section has sponsored an annual tax institute for practicing lawyers. See Report of Taxation Section, Wis. Bar Bull., June 1959, pp. 53–54. Many of the papers delivered at such sessions are later given wider circulation to the Bar by publication in the Bar Bulletin. In addition, the State Bar has undertaken the sponsorship of numerous special seminars and symposia, see *e. g.*, Wis. Bar Bull., Aug. 1960, p. 41. And it has made funds available to the University of Wisconsin Law School to compensate students for assisting in the preparation of materials for post graduate programs. See Board of Governors Minutes, Apr. 25, 1958; Wis. Bar Bull., Aug. 1958, pp. 69–70.

[11] Prior to integration the Board of State Bar Commissioners conducted and paid for the investigation of grievances. Since then the grievance committees have performed most of that work, with a resulting diminution in the financial needs of the bar commissioners. A former president of the State Bar commented of these committees' performance of their functions: "The result is that a majority of complaints are adjusted or explained to the satisfaction of the complainant, and the State Bar Commissioners are saved considerable time and effort . . . ." Wis. Bar Bull., Aug. 1958, p. 68. See also *id.*, Aug. 1960, p. 41.

[12] Revenues from integration enabled the State Bar to employ a lawyer whose principal task is the investigation of complaints of unauthorized practice and the effort to achieve their discontinuance. A number of legal actions to prevent unauthorized practice have been instituted. See, *e. g.*, Wis. Bar Bull., Aug. 1960, p. 45; *id.*, June 1960, pp. 49–50; *id.*, June 1958, pp. 48–49. The Committee on Unauthorized Practice has also worked with the Committee on Interprofessional and Business Relations in conferring with other professional groups to establish demarcation lines between their activities and those of the bar. Thus an agreement was negotiated with the

Legal Aid Committee had "done effective and noteworthy work to encourage the local bar associations of the state to set up legal-aid systems in their local communities. . . . Such committee has also outlined recommended procedures for establishing and carrying through such systems of providing legal aid." 10 Wis. 2d, at p. 249.[13] In the field of public relations the court found that the "chief activity" of the State Bar was the "preparation, publication and distribution to the general public of pamphlets dealing with various transactions and happenings with which laymen are frequently confronted, which embody legal problems." 10 Wis. 2d, at p. 247.[14] More-

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Association of Certified Public Accountants and a joint committee provided to police it. See Board of Governors Minutes, Dec. 9, 1960. The Committee on Interprofessional and Business Relations has also participated in projects for the formulation of agreements with the Association of Real Estate Brokers and the Association of Collection Agencies, and its program includes conferences with other professional groups. See Executive Committee Minutes, July 22, 1960. Legal ethics is another concern of the State Bar. Its Committee on Professional Ethics has given opinions on a number of questions of ethical practice. See, *e. g.*, Wis. Bar Bull., June 1960, pp. 46–49.

[13] The number of lawyers in Wisconsin participating in legal aid has steadily increased. The committee reported in 1960 that it would "continue to vigorously carry on its program of rendering prompt and efficient legal aid services to all those who require the same; to continue to work diligently to the realization of the goal that every county bar association within our State have an effective legal aid bureau or legal aid society as soon as possible; to continue our policy of bringing into our open forum meetings on legal aid, the most outstanding authorities on the subject, to the end that we here in the State of Wisconsin will at all times have the fullest, up-to-date information on every phase of legal aid. . . ." Wis. Bar Bull., June 1960, p. 64. See also *id.*, June 1959, p. 63.

[14] The State Bar has also prepared articles on legal subjects for distribution to newspapers throughout the State. It has been concerned with the promotion of the annual Law Day. See, *e. g.*, Wis. Bar Bull., Aug. 1958, p. 67. The Bar Bulletin, in addition to publishing

over, a number of studies have been made of programs, not involving political action, to further the economic well-being of the profession.[15]

This examination of the purposes and functions of the State Bar shows its multifaceted character, in fact as well as in conception. In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employees Dept.* v. *Hanson*, 351 U. S. 225. We there held that § 2, Eleventh of the Railway Labor Act, 45 U. S. C. § 152,

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articles on legal subjects, has issued special supplements explaining and annotating new laws, and has printed checklists for attorneys suggesting how to proceed with various legal problems. Its avowed aim is to make the Bulletin "a very practical means for all practicing lawyers to keep posted on the ever-changing requirements in the practice. . . . We believe that one of the great justifications for integration is found in the means of publication and communication from the Bar to the member through these vehicles." Wis. Bar Bull., June 1960, p. 67.

[15] The stated functions of the Special Committee on Economics of the Bar are: "[t]he committee will engage itself in the general study of the economics of the Bar to determine a fair fee schedule from time to time; seek its uniform adoption and recognition throughout the state; study the encroachment of lay agencies on the fields of law; make suggestions for proper office management, and make such recommendations from time to time as it considers proper in the general field." Wis. Bar Bull., June 1959, p. 58. One of the principal products of such activity has been a recommended schedule of minimum fees for Wisconsin lawyers; this schedule was published and distributed at a cost of over $10,000 to the State Bar. See Wis. Bar Bull., Aug. 1950, p. 40; also *id.*, pp. 10–11. Another project authorized by the Board of Governors is a comprehensive statistical study of the economic status of Wisconsin lawyers. See Board of Governors Minutes, Sept. 23, 1960, Dec. 11, 1960. Other special committees have considered such matters as group insurance for State Bar members and creation of a client security plan to insure against attorneys' defalcations. See, *e. g.*, Wis. Bar Bull., Aug. 1960, p. 41; Board of Governors Minutes, Feb. 18, 1959; Executive Committee Minutes, Sept. 23, 1960.

Eleventh, did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments. There too the record indicated that the organizations engaged in some activities similar to the legislative activities of which the appellant complains. See *International Association of Machinists Union* v. *Street*, note 5. In rejecting Hanson's claim of abridgment of his rights of freedom of association, we said, "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U. S. 238. Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy.[16] We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the inte-

[16] On the subject of integration of the bar in the United States, see generally Glaser, The Organization of the Integrated Bar, The Debate Over the Integrated Bar, and Bibliography on the Integrated Bar (Columbia University Bureau of Applied Social Research). Comprehensive discussions of integration of the Bar in the various States are contained in briefs *amici curiae* filed with the Court in this case.

grated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.

However, appellant would have us go farther and decide whether his constitutional rights of free speech are infringed if his dues money is used to support the political activities of the State Bar. The State Supreme Court treated the case as raising the question whether First Amendment rights were violated "because part of his dues money is used to support causes to which he is opposed." 10 Wis. 2d, at p. 238. The Court in rejecting appellant's argument reasoned that "[t]he right to practice law is not a right but is a privilege subject to regulation. . . . The only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process." *Id.*, pp. 237–238. The Court found no such burden because ". . . the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. . . . The only challenged interference with his liberty is the exaction of annual dues to the State Bar, in the nature of the imposition of an annual license fee, not unreasonable or unduly burdensome in amount, part of which is used to advocate causes to which he is opposed. However, this court, in which is vested the power of the state to regulate the practice of law, has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically

chosen representatives comprising the board of governors of the State Bar. The public interest so promoted far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues." *Id.*, pp. 239, 242.[17]

We are persuaded that on this record we have no sound basis for deciding appellant's constitutional claim insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes. Even if the demurrer is taken as admitting all the factual allegations of the complaint, even if these allegations are construed most expansively, and even if, like the Wisconsin Supreme Court, we take judicial notice of the political activities of the State Bar, still we think that the issue of impingement upon rights of free speech through the use of exacted dues is no more concretely presented for adjudication than it was in *Hanson*. Compare *International Association of Machinists* v. *Street*,

[17] The Wisconsin Supreme Court originally declined to order integration partly because of misgivings whether possible political activities of the integrated Bar would be consistent with the public interest sought to be served. See *In re Integration of the Bar*, 249 Wis. 523. It indicated that integration would "require it to censor the budgets and activities of the bar after integration" and said: "It requires a very short look at some of the possible activities of the bar to make it clear that this court would have to insist upon scrutinizing every activity for which it is proposed to expend funds derived from dues, and that a series of situations would arise that would be embarrassing to the relations of bench and bar." *Id.*, pp. 528, 529–530. These reservations were expressly disclaimed when the court continued integration in 1958, 5 Wis. 2d 618, 626–627. The court said: "The integrated State Bar of Wisconsin is independent and free to conduct its activities within the framework of such rules and by-laws." *Id.*, p. 626. The court reiterated this position in the present case: "In so far as it confines such activities to those authorized by the rules and by-laws, this court will not interfere or in any manner seek to control or censor the action taken, or to substitute its judgment for that of the membership of the State Bar." 10 Wis. 2d, at p. 240.

decided today, pp. 6–7. Nowhere are we clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities. There is an allegation in the complaint that the State Bar had "used its employees, property and funds in active unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin which was favored by the plaintiff, all contrary to the plaintiff's convictions and beliefs," but there is no indication of the nature of this legislation, nor of appellant's views on particular proposals, nor of whether any of his dues were used to support the State Bar's positions. There is an allegation that the State Bar's revenues amount to about $90,000 a year, of which $80,000 is derived from dues, but there is no indication in the record as to how political expenditures are financed and how much has been expended for political causes to which appellant objects. The facts of which the Supreme Court took judicial notice do not enlighten us on these gaps in the record. The minutes of the Board of Governors and Executive Committee of the State Bar show that the organization has taken one position or another on a wide variety of issues, but those minutes give no indication of appellant's views as to any of such issues or of what portions of the expenditure of funds to propagate the State Bar's views may be properly apportioned to his dues payments. Nor do the other publications of the State Bar. The Supreme Court assumed, as apparently the trial court did in passing on the demurrer, that the appellant was personally opposed to some of the legislation supported by the State Bar. But its opinion still gave no description of any specific measures he opposed, or the extent to which the State Bar actually utilized dues funds for specific purposes to which he had objected. Appel-

lant's phrasing of the question presented on appeal in this Court is not responsive to any of these inquiries as to facts which may be relevant to the determination of constitutional questions surrounding the political expenditures. It merely asks whether a requirement of financial support of an association which "among other things uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion" can be constitutionally imposed on him. This statement of the question, just as does his complaint, appears more a claim of the right to be free from compelled financial support of the organization because of its political activities, than a challenge by appellant to the use of his dues money for particular political causes of which he disapproves. Moreover, although the court below purported to decide as against all Fourteenth Amendment claims that the appellant could be compelled to pay his annual dues, even though "part of [it] . . . is used to advocate causes to which he is opposed," on oral argument here appellant disclaimed any necessity to show that he had opposed the position of the State Bar on any particular issue and asserted that it was sufficient that he opposed the use of his money for any political purposes at all. In view of the state of the record and this disclaimer, we think that we would not be justified in passing on the constitutional question considered below. "[T]he questions involving the power of . . . [the State] come here not so shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of . . . [state] power requires." *United States* v. *C. I. O.*, 335 U. S. 106, 126 (concurring opinion). Cf. *United States* v. *U. A. W.–C. I. O.*, 352 U. S. 567, 589–592.

We, therefore, intimate no view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to con-

tribute his financial support to political activities which he opposes. That issue is reserved, just as it was in *Hanson*, see *Street*, pp. 5–8. Upon this understanding we four vote to affirm. Since three of our colleagues are of the view that the claim which we do not decide is properly here and has no merit, and on that ground affirm, the judgment of the Wisconsin Supreme Court is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 200.—October Term, 1960.

Trayton L. Lathrop, Appellant, v. Joseph D. Donohue.	On Appeal From the Supreme Court of the State of Wisconsin.

[June 19, 1961.]

Mr. Justice Harlan, with whom Mr. Justice Frankfurter joins, concurring in the judgment.

I think it most unfortunate that the right of the Wisconsin Integrated Bar to use, in whole or in part, the dues of dissident members to carry on legislative and other programs of law reform—doubtless among the most useful and significant branches of its authorized activities—should be left in such disquieting Constitutional uncertainty. The effect of that uncertainty is compounded by the circumstance that it will doubtless also reach into the Integrated Bars of twenty-five other States.[1]

I must say, with all respect, that the reasons stated in the plurality opinion for avoiding decision of this Constitutional issue can hardly be regarded as anything but trivial. For, given the unquestioned fact that the Wisconsin Bar uses or threatens to use, over appellant's protest, some part of its receipts to further or oppose legislation on matters of law reform and the administration of justice, I am at a loss to understand how it can be thought that this record affords "no sound basis" for adjudicating

[1] Alabama, Alaska, Arizona, California, Florida, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wyoming. See note 14, dissenting opinion of Mr. Justice Frankfurter in *International Machinists* v. *Street*, *ante*, p. —. Arkansas has a Bar which is integrated only with respect to disciplinary matters. 207 Ark. xxxiv–xxxvii.

the issue simply because we are not "clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities," (*ante*, p. ——). I agree with my Brother BLACK that the Constitutional issue is inescapably before us.

Unless one is ready to fall prey to what are at best but alluring abstractions on rights of free speech and association, I think he will be hard put to it to find any solid basis for the Constitutional qualms which, though unexpressed, so obviously underlie the plurality opinion, or for the views of my two dissenting Brothers, one of whom finds unconstitutional the entire Integrated Bar concept (*post*, pp. ——, and the other of whom holds the operations of such a Bar unconstitutional to the extent that they involve taking "the money of protesting lawyers" and using "it to support causes they are against," (*post*, pp. ——).

For me, there is a short and simple answer to all of this. The *Hanson* case, 351 U. S. 225, decided by a unanimous Court, surely lays at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs. Indeed the conclusion reached in *Hanson* with respect to compulsory union membership seems to me *a fortiori* true here, in light of the supervisory powers which the state, through its courts, has traditionally exercised over admission to the practice of law, see *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82, and over the conduct of lawyers after admission, see *Cohen* v. *Hurley*, 366 U. S. 117. The Integrated Bar was in fact treated as such an *a fortiori* case in the *Hanson* opinion itself. *Supra*, at 238. So much, indeed, is recognized by the plurality opinion which rejects the

contention that Wisconsin could not Constitutionally require appellant, a lawyer, to become and remain a dues-paying member of the State Bar.

That being so, I do not understand why it should become unconstitutional for the State Bar to use appellant's dues to fulfill some of the very purposes for which it was established. I am wholly unable to follow the force of reasoning which, on the one hand, denies that compulsory dues-paying membership in an Integrated Bar infringes "freedom of association," and, on the other, in effect affirms that such membership, to the extent it entails the use of a dissident member's dues for legitimate Bar purposes, infringes "freedom of speech." This is a refinement between two aspects of what, in circumstances like these, is essentially but a single facet of the "liberty" assured by the Fourteenth Amendment, see *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 460, that is too subtle for me to grasp.

Nevertheless, since a majority of the Court here, as in the *Street* case, *ante*, p. —, has deemed the "free speech" issue to be distinct from that of "free association," I shall also treat the case on that basis. From a Constitutional standpoint, I think that there can be no doubt about Wisconsin's right to use appellant's dues in furtherance of any of the purposes now drawn in question.[2] Orderly analysis

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[2] Among other things, the Integrated Bar of the State of Wisconsin is authorized by the State Supreme Court, acting under its inherent rule-making powers, to publish information relating to "the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public." Rule 1, 273 Wis., p. xi. Rule 4, § 4, provides for standing committees including, *inter alia*, Committees on Administration of Justice and on Legislation. 273 Wis. xvi. The function of the former, as set out in Art. IV, § 4, of the by-laws, 273 Wis. xxxiii, is to "study the organization and operation of the Wisconsin judicial system and, . . . recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof. . . ." The function of the Committee on Legislation is to study and, in

requires that there be considered, *first*, the respects in which it may be thought that the use of a member's dues for causes he is again impinges on his right of free speech, and *second*, the nature of the state interest offered to justify such use of the dues exacted from him. I shall also add some further observations as to the overall Constitutionality of the Integrated Bar concept.

I.

To avoid the pitfall of disarming, and usually obscuring, generalization which too often characterizes discussions in this Constitutional field, I see no alternative (even at the risk of being thought to labor the obvious) but to deal in turn with each of the various specific impingements on "free speech" which have been suggested or intimated to flow from the State Bar's use of an objecting member's dues for the purposes involved in this case. As I understand things, it is said that the operation of the Integrated Bar tends (1) to reduce a dissident member's "economic capacity" to espouse causes in which he believes; (2) to further governmental "establishment" of political views; (3) to threaten development of a "guild system" of closed, self-regulating professions and businesses; (4) to "drown out" the voice of dissent by requiring all members of the Bar to lend financial support

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certain circumstances, support or oppose "proposals submitted to the Wisconsin Legislature or the Congress of the United States for changes in the statutes relating to the courts or the practice of law. . . ." Art. IV, § 9, 273 Wis. xxxiv. The enabling court rules indicate authorization for further study and comment on proposed legislation, for the board of governors is directed to establish sections on corporation and business law; family law; house counsel; insurance, negligence and workmen's compensation law; labor relations law; military law; real property, probate, and trust law; and taxation. 273 Wis. xvii. The plurality opinion of this Court sets out the nature and scope of the activities bearing on prospective legislation actually engaged in by this Integrated Bar. *Ante*, p. —.

to the views of the majority; and (5) to interfere with freedom of belief by causing "compelled affirmation" of majority-held views. With deference, I am bound to say that, in my view, all of these arguments border on the chimerical.

1. Reduction in "Economic Capacity" to Espouse Views.

This argument which, if indeed suggested at all, is intimated only obliquely, is that the mere exaction of dues money works a Constitutionally cognizable inhibition of speech by reducing the resources otherwise available to a dissident member for the espousal of causes in which he believes. The untenability of such a proposition becomes immediately apparent when it is recognized that this rationale would make every governmental exaction the material of a "free speech" issue. Even the federal income tax would be suspect. And certainly this source of inhibition is as great if the Integrated Bar wastes its dues on dinners as if it spends them on recommendations to the legislature. Yet I suppose that no one would be willing to contend that every waste of money exacted by some form of compulsion is an abridgment of free speech.

2. "Establishment" of Political Views.

The suggestion that a State-created Integrated Bar amounts to a governmental "establishment" of political belief, is hardly worthy of more serious consideration. Even those who would treat the Fourteenth Amendment as embracing the identical protections afforded by the First would have to recognize the clear distinction in the wording of the First Amendment between the protections of speech and religion, only the latter providing a protection against "establishment." And as to the Fourteenth, viewed independently of the First, one can surely agree that a State could not "create a fund to be used

in helping certain political parties or groups favored" by it "to elect their candidates or promote their controversial causes" (*ante*, p. ——), any more than could Congress do so, without agreeing that this is in any way analogous to what Wisconsin has done in creating its Integrated Bar, or to what Congress has provided in the Railway Labor Act, considered in the *Street*, case, *ante*, p. ——.

In establishing the Integrated Bar Wisconsin has, I assume all would agree, shown no interest at all in favoring particular candidates for judicial or legal office or particular types of legislation. Even if Wisconsin had such an interest, the Integrated Bar does not provide a fixed, predictable conduit for governmental encouragement of particular views, for the Bar makes its own decisions on legislative recommendations and appears to take no action at all with regard to candidates. By the same token the weight lent to one side of a controversial issue by the prestige of government is wholly lacking here.

In short, it seems to me fanciful in the extreme to find in the limited functions of the Wisconsin State Bar those risks of governmental self-perpetuation that might justify the recognition of a Constitutional protection against the "establishment" of political beliefs. A contrary conclusion would, it seems to me, as well embrace within its rationale the operations of the Judicial Conference of the United States, and the legislative recommendations of independent agencies such as the Interstate Commerce Commission and the Bureau of the Budget.

3. Development of a "Guild System."

It is said that the Integrated Bar concept tends towards the development of some sort of a "guild system." But there are no requirements of action or inaction connected with the Wisconsin Integrated Bar, as contrasted with any unintegrated bar, except for the requirement of payment

of $15 annual dues. I would agree that the requirement of payment of dues could not be made the basis of limiting the profession of law to the comparatively wealthy. Cf. *Griffin* v. *Illinois*, 351 U. S. 12. Nor, doubtless, could admission to the profession be restricted to relatives of those already admitted. But there is no such "guild" threat presented in this situation.

True, the Wisconsin Bar makes recommendations to the State Supreme Court for regulatory canons of legal ethics, and it may be supposed that the Bar is not forbidden to address the State Legislature for measures regulating in some respects the conduct of lawyers. But neither activity is the kind of direct self-regulation that was stricken down in *Schechter Corp.* v. *United States*, 295 U. S. 495. The Wisconsin Supreme Court has retained *all* of the traditional powers of a court to supervise the activities of practicing lawyers. It has delegated *none* of these to the Integrated Bar. As put by the State Supreme Court:

> "The integrated Bar has no power to discipline or to disbar any member. That power has been reserved to and not delegated by this court. The procedure under sec. 256.28, Stats., for filing complaints for discipline or disbarment in this court is unaffected by these rules. Rule 11 and Rule 7 provide an orderly and easy method by which proposals to amend or abrogate the Rules of the State Bar may be brought before this court for hearing on petition. Rule 9 provides the rules of professional conduct set forth from time to time in the canons of the professional ethics of the American Bar Association, as supplemented or modified by pronouncement of this court, shall be the standard governing the practice of law in this state. Prior to the adoption of the rules this court has not expressly adopted such canons of professional ethics *in toto*.

"The by-laws of the State Bar provide for the internal workings of the organization and by Rule 11, sec. 2, may be amended or abrogated by resolution adopted by a vote of ⅔ of the members of the Board of Governors or by the members of the association themselves through the referendum procedure. As a further protection to the minority a petition for review of any change in the By-laws made by the Board of Governors will be entertained by the court if signed by 25 or more active members.

"Independently of the provisions in the Rules for invoking our supervisory jurisdiction, this court has inherent power to take remedial action, on a sufficient showing that the activities or policies of the State Bar are not in harmony with the objectives for which integration was ordered or are otherwise contrary to the public interest." *In re Integration of Bar*, 5 Wis. 2d 618, 624–625.

Moreover, it is by no means clear to me in what part of the Federal Constitution we are to find the prohibition of *state-authorized* self-regulation of and by an economic group that the *Schechter* case found in Article I as respects the Federal Government. Is state-authorized self-regulation of lawyers to be the occasion for judicial enforcement of Art. IV, § 4, which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government, . . ."? Cf. *Luther* v. *Borden*, 7 How. 1; *Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U. S. 118.

4. "Drowning Out" the Voice of Dissent.

This objection can be stated in either of two ways. First: The requirement of dues payments to be spent to further views to which the payor is opposed tends to increase the volume of the arguments he opposes and

thereby to drown out his own voice in opposition, in violation of his Constitutional right to be heard. Second: The United States Constitution creates a scheme of federal and state governments each of which is to be elected on a one-man-one-vote basis and on a one-man-one-political-voice basis. Of course several persons may voluntarily cumulate their political voices, but no governmental force can require a single individual to contribute money to support views to be adopted by a democratically organized group even if the individual is also free to say what he pleases separately.

It seems to me these arguments have little force. In the first place, their supposition is that the voice of a dissenter is less effective if he speaks it first in an attempt to influence the action of a democratically organized group and then, if necessary, in dissent to the recommendations of that group. This is not at all convincing. The dissenter is not being made to contribute funds to the furtherance of views he opposes but is rather being made to contribute funds to a group expenditure about which he will have something to say. To the extent that his voice of dissent can convince his lawyer associates, it will later be heard by the State Legislature with a magnified voice. In short, I think it begs the question to approach the Constitutional issue with the assumption that the majority of the Bar has a permanently formulated position which the dissenting dues payor is being required to support, thus increasing the difficulty of effective opposition to it.

Moreover, I do not think it can be said with any assurance that being required to contribute to the dispersion of views one opposes has a substantial limiting effect on one's right to speak and be heard. Certainly these rights would be limited if state action substantially reduced one's ability to reach his audience. But are these rights substantially affected by increasing the opposition's ability

to reach the same audience? I can conceive of instances involving limited facilities, such as television time, which may go to the highest bidder, wherein increasing the resources of the opposition may tend to reduce a dissident's access to his audience. But before the Constitution comes into play, there should surely be some showing of a relationship between required financial support of the opposition and reduced ability to communicate, a showing I think hardly possible in the case of the legislative recommendations of the Wisconsin Bar. And, aside from the considerations of freedom from compelled affirmations of belief to be discussed later, I can find little basis for a right not to have one's opposition heard.

Beyond all this, the argument under discussion is contradicted in the everyday operation of our society. Of course it is disagreeable to see a group, to which one has been required to contribute, decide to spend its money for purposes the contributor opposes. But the Constitution does not protect against the mere play of personal emotions. We recognized in *Hanson* that an employee can be required to contribute to the propagation of personally repugnant views on working conditions or retirement benefits that are expressed on union picket signs or in union handbills. A federal taxpayer obtains no refund if he is offended by what is put out by United States Information Office. Such examples could be multiplied.

For me, this "drowning out" argument falls apart upon analysis.

5. "Compelled Affirmation" of Belief.

It is argued that the requirement of Bar dues payments which may be spent for legislative recommendations which the payor opposes amounts to a compelled affirmation of belief of the sort this Court struck down in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624. While I agree that the rationale of *Barnette* is relevant,

I do not think that it is in any sense controlling in the present case.

Mr. Justice Jackson, writing for the Court in *Barnette*, did not view the issue as turning merely "on one's possession of particular religious views or the sincerity with which they are held.". 319 U. S., at 634. The holding of *Barnette* was that, no matter how strong or weak such beliefs might be, the Legislature of West Virginia was not free to require as concrete and intimate an expression of belief in any cause as that involved in a compulsory pledge of allegiance. It is in this light that one must assess the contention that, "Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against" (*ante*, p. ——). One could as well say that the same mere difference in degree distinguishes the *Barnette* flag salute situation from a taxpayer's objections to the views a government agency presents, at public expense, to Congress. What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance.

In *Barnette* there was a governmental purpose of requiring expression of a view in order to encourage adoption of that view, much the same as when a school teacher requires a student to write a message of self-correction on the blackboard one hundred times. In the present case there is no indication of a governmental purpose to fur-

ther the expression of any particular view. More than that, the State Bar's purpose of furthering expression of views, is unconnected with any desire to induce belief or conviction by the device of forcing a person to identify himself with the expression of such views. True, purpose may not be controlling when the identification is intimate between the person who wishes to remain silent and the beliefs foisted upon him. But no such situation exists here where the connection between the payment of an individual's dues and the views to which he objects is factually so remote. Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that "everyone understands or should understand" that the views expressed are those "of the State Bar as an entity separate and distinct from each individual." 5 Wis. 2d 623.

Indeed, I think the extreme difficulty the Court encounters in the *Street* case (*ante*, p. —) in finding a mechanism for reimbursing dissident union members for their share of "political" expenditures, is wholly occasioned by, and is indicative of, the many steps of changed possession, ownership, and control of dues receipts and the multiple stages of decision making which separate the dues payor from the political expenditure of some part of his dues. I think these many steps and stages reflect as well upon whether there is an identification of dues payor and expenditure so intimate as to amount to a "compelled affirmation." Surely if this Court in *Street* can only with great difficulty—if at all—identify the contributions of particular union members with the union's political expenditures, we should pause before assuming that particular Bar members can sensibly hear their own voices when the State Bar speaks as an organization.

Mr. Justice Cardozo, writing for himself, Mr. Justice Brandeis, and Mr. Justice Stone in *Hamilton* v. *Regents*, 293 U. S. 245, 265, thought that the remoteness of the

connection between a conscientious objection to war and the study of military science was in itself sufficient to make untenable a claim that requiring this study in state universities amounted to a state establishment of religion. These Justices thought the case even clearer when all that was involved was a contribution of money:

> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war . . . or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." *Hamilton* v. *Regents*, 293 U. S. 245, 268.

Nor do I now believe that a state taxpayer could object on Fourteenth Amendment grounds to the use of his money for school textbooks or instruction which he finds intellectually repulsive, nor for the mere purchase of a flag for the school. In the present case appellant is simply required to pay dues into the general funds of the State Bar. I do not think a subsequent decision by the representatives of the majority of the bar members to devote some part of the organization's funds to the furtherance of a legislative proposal so identifies the individual payor of dues with the belief expressed that we are in the *Barnette* realm of "asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one. . . ." 319 U. S., at 634.

It seems to me evident that the actual core of appellant's complaint as to "compelled affirmation" is not the identification with causes to which he objects that might arise from some conceivable tracing of the use of his dues in their support, but is his forced association with the

Integrated Bar. That, however, is a bridge which, beyond all doubt and any protestations now made to the contrary, we crossed in the *Hanson* case. I can see no way to uncross it without overruling *Hanson*. Certainly it cannot be done by declaring as a rule of law that lawyers feel more strongly about the identification of their names with proposals for law reform than union members feel about the identification of their names with collective bargaining demands declared on the radio, in picket signs, and on handbills.

II.

While I think that what has been said might well dispose of this case without more, in that Wisconsin lawyers retain "full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against" (*post*, p. —), I shall pass on to consider the state interest involved in the establishment of the Integrated Bar, the other ingredient of adjudication which arises whenever incidental impingement upon such freedoms may fairly be said to draw in question governmental action. See, *e. g.*, *Barenblatt* v. *United States*, 360 U. S. 109; *Konigsberg* v. *State Bar of California*, *supra*.

In this instance it can hardly be doubted that it was Constitutionally permissible for Wisconsin to regard the functions of an Integrated Bar as sufficiently important to justify whatever incursions on these individual freedoms may be thought to arise from the operations of the organization. The Wisconsin Supreme Court has described the fields of the State Bar's legislative activities and has asserted its readiness to restrict legislative recommendations to those fields:

> "This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the

> legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice. Neither the above-quoted by-laws nor the stated purposes set forth in section 2 of Rule 1 for which the bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects. . . . However, as we pointed out in our opinion in the 1958 *In re Integration of the Bar Case*, this court will exercise its inherent power to take remedial action should the State Bar engage in an activity not authorized by the rules and by-laws and not in keeping with the stated objectives for which it was created. If the lawyers of the state wish by group action to engage in legislative activities not so authorized they will have to do so within the framework of some voluntary association, and not the State Bar." 10 Wis. 2d 230, 239–240.

Further, the same court has declared its belief that the lawyers of the State possess an expertise useful to the public interest within these fields:

> "We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association." *Ibid.*

I do not think that the State Court's view in this respect can be considered in any way unreasonable.

"The composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law" may well be as helpful and informative to a state legislature as the work of individual legal scholars and of such organizations as the American Law Institute, for example, is to state and federal courts. State and federal courts are, of course, indifferent to the personal beliefs and predilections of any of such groups. The function such groups serve is a rationalizing one and their power flows from and is limited to their ability to convince by arguments from generally agreed upon premises. They are exercising the techniques and knowledge which lawyers are trained to possess in the task of solving problems with which the legal profession is most familiar. The numberless judicial citations to their work is proof enough of their usefulness in the judicial decision-making process.[3]

Legislatures too have found that they can benefit from a legal "expert's effort to improve the law in technical and non-controversial areas." *Dulles* v. *Johnson*, 273 F. 2d 362, 367. In the words of the Executive Secretary of the New York Law Revision Commission, there are areas in which "lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups." 40 Cornell L. Q. 641, 644. See also Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113. The Acts recommended by the Commissioners on Uniform State Laws have been adopted on over 1,300 occasions by the legislatures of the fifty States, Puerto Rico, and the District of Columbia. Handbook of the National Conference of Commissioners on Uniform State Laws (1960), at p. 207. There is no way of counting the number of occasions on

[3] The nine Restatements of the law alone have been cited well over 27,000 times. 36th Annual Meeting, The American Law Institute, at p. 63.

which state legislatures have utilized the assistance of legal advisory groups. Some indication may be obtained by noting that thirty-one jurisdictions have permanent legislative service agencies which recommend "substantive" legislative programs and forty-two jurisdictions utilize such permanent agencies in recommending statutory revision.[4]

In this light I can only regard as entirely gratuitous a contention that there is anything less than a most substantial state interest in Wisconsin having the views of the members of its Bar "on measures directly affecting the administration of justice and the practice of law." Nor can I take seriously a suggestion that the lawyers of Wisconsin are merely being polled on matters of their own personal belief or predilection, any more than Congress had in mind such a poll when it made it the duty of federal circuit judges summoned to attend the Judicial Conference of the United States "to advise . . . as to any matters in respect of which the administration of justice in the courts of the United States may be improved." 42 Stat. 837, 838.

III.

Beyond this conjunction of a highly significant state need and the chimerical nature of the claims of abridgment of individual freedom, there is still a further approach to the entire problem that combines both of these aspects and reinforces my belief in the Constitutionality of the Integrated Bar.

I had supposed it beyond doubt that a state legislature could set up a staff or commission to recommend changes in the more or less technical areas of the law into which no well-advised laymen would venture without the assistance of counsel. A state legislature could certainly ap-

[4] "Permanent Legislative Service Agencies," published by Council of State Governments.

point a commission to make recommendations to it on the desirability of passing or modifying any of the countless uniform laws dealing with all kinds of legal subjects, running all the way from the Uniform Commercial Code to the Uniform Simultaneous Death Law.[5] It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer, doctor, dentist, etc. See *Royall* v. *Virginia*, 116 U. S. 572. In these circumstances, wherein lies the unconstitutionality of what Wisconsin has done? Does the Constitution forbid the payment of some part of the Constitutional license fee directly to the equally Constitutional state law revision commission? Or is it that such a commission cannot be chosen by a majority vote of all the members of the state bar? Or could it be that the Federal Constitution requires a separation of state powers according to which a state legislature can tax and set up commissions but a state judiciary cannot do these things?

I end as I began. It is exceedingly regrettable that such specious contentions as appellant makes in this case should have resulted in putting the Integrated Bar under this cloud of partial unconstitutionality.

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[5] In thirty-three States the legislature appoints Commissioners on Uniform State Laws. Handbook of the National Conference of Commissioners on Uniform State Laws (1960), at p. 211.

SUPREME COURT OF THE UNITED STATES

No. 200.—October Term, 1960.

Trayton L. Lathrop, Appellant, *v.* Joseph D. Donohue.	On Appeal From the Supreme Court of the State of Wisconsin.

[June 19, 1961.]

Mr. Justice Whittaker, concurring in result.

Believing that the State's requirement that a lawyer pay to its designee an annual fee of $15 as a condition of its grant, or of continuing its grant, to him of the *special privilege* (which is what it is) of practicing law in the State—which is really all that is involved here—does not violate any provision of the United States Constitution, I join in the result of the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 200.—October Term, 1960.

Trayton L. Lathrop, Appellant, v. Joseph D. Donohue.	On Appeal From the Supreme Court of the State of Wisconsin.

[June 19, 1961.]

Mr. Justice Black, dissenting.

I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not. Two members of the Court, saying that "the Constitutional issue is inescapably before us," vote to affirm the holding of the Wisconsin Supreme Court that a State can, without violating the Federal Constitution, compel lawyers over their protest to pay dues to be used in part for the support of legislation and causes they detest. Another member, apparently agreeing that the constitutional question is properly here, votes to affirm the holding of the Wisconsin Supreme Court because he believes that a State may constitutionally require a lawyer to pay a fee to its "designee" as a condition to granting him the "*special privilege*" of practicing law, even though that "designee," over the lawyer's protest, uses part of the fee to support causes the lawyer detests. Two other members of the Court vote to reverse the judgment of the Wisconsin court on the ground that the constitutional question is properly here and the powers conferred on the Wisconsin State Bar by the laws of that State violate the First and Fourteenth Amendments. Finally, four members of the Court vote to affirm on the ground that the constitutional question is actually not here for decision at all. Thus the only proposition in this case for which there is a majority is that the constitutional question is properly here, and the

five members of the Court who make up that majority express their views on this constitutional question. Yet a minority of four refuses to pass on the question and it is therefore left completely up in the air—the Court decides nothing. If ever there were two cases that should be set over for reargument in order for the Court to decide—or at least to make an orderly attempt to decide—the basic constitutional question involved in both of them, it is this case and the companion case of *International Association of Machinists* v. *Street*.[1] In this state of affairs, I find it necessary to set out my views on the questions which I think are properly presented and argued by the parties.

In my judgment, this Court cannot properly avoid decision of the single, sharply defined constitutional issue which this case presents. The appellant filed a complaint in a Wisconsin Circuit Court, charging that he is being compelled by the State of Wisconsin, as a prerequisite to maintaining his status as a lawyer in good standing, to be a member of an association known as the State Bar of Wisconsin and to pay dues to that association; that he has paid these dues only under protest; that the State Bar of Wisconsin is using his money along with the moneys it has collected from other Wisconsin lawyers to engage in activities of a political and propagandistic nature in favor of objectives to which he is opposed and against objectives which he favors; and that, as a consequence of this compelled financial support of political views to which he is personally antagonistic, he is being deprived of rights guaranteed to him by the First and Fourteenth Amendments of the Federal Constitution. Upon demurrer to this complaint, the Circuit Court held that it must be dismissed without leave to amend because, in the opinion of that court, "it would be impossible to frame a com-

[1] *Ante*, p. —.

plaint so as to state facts sufficient to constitute a cause of action against either the State Bar of Wisconsin or the defendant Donohue." [2]

On appeal, the Supreme Court of Wisconsin, relying upon its powers of judicial notice, found as a fact that the State Bar does expend some of the moneys it collects as dues to further and oppose legislation [3] and that court also accepted, at its full face value, the allegation of the complaint that many of these expenditures furthered views directly contrary to those held by the appellant.[4] The Wisconsin Supreme Court nevertheless affirmed the judgment of the trial court on the ground that the public interest in having "public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law . . . far outweighs the slight inconvenience to," and hence any abridgment of the constitu-

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[2] The Circuit Court also found jurisdictional difficulties with appellant's complaint but it expressly declined to rest its decision upon the jurisdictional defects alone.

[3] "This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every every instance the legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice." *Lathrop* v. *Donohue*, 10 Wis. 2d 230, 239. The scope of this finding is shown by the court's further statement in answer to appellant's contention that the State Bar also took positions on strictly substantive legislation: "We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law." *Ibid.*

[4] Thus, the Wisconsin court correctly stated the issue in this case: "The only challenged interference with his liberty is the exaction of annual dues to the State Bar . . . part of which is used to advocate causes to which he is opposed." *Id.*, at 242.

tional rights of, those who disagree with the views advocated by the State Bar.[5]

The plurality decision to affirm the judgment of the Wisconsin courts on the ground that the issue in the case is not "shaped . . . as leanly and as sharply as judicial judgment upon an exercise of . . . [state] power requires" is, in my judgment, wrong on at least two grounds. First of all, it completely denies the appellant an opportunity to amend his complaint so as to "shape" the issue in a manner that would be acceptable to this Court. Appellant's complaint was dismissed by the Wisconsin courts without giving him a chance to amend it and before he had an opportunity to bring out the facts in the case, solely because those courts believed that it would be impossible for him to allege any facts sufficient to entitle him to relief. The plurality now suggests, by implication, that the Wisconsin courts were wrong on this point and that appellant could possibly make out a case under his complaint. Why then is the case not remanded to the Wisconsin courts in order that the appellant will have at least one opportunity to meet this Court's fastidious pleading demands? The opinions of the Wisconsin courts in this case indicate that the laws of that State—as do the laws in most civilized jurisdictions—permit amendments and clarifications of complaints where defects exist in the original complaint which can be cured. And even if Wisconsin law were to the contrary, it is settled by the

[5] *Ibid.* The Wisconsin Supreme Court agreed with the Circuit Court that there were jurisdictional difficulties with the suit as it was brought. But the Supreme Court, like the Circuit Court, did not rest its decision on these jurisdictional grounds. Even though it agreed that the Circuit Court did not properly have jurisdiction, it expressly affirmed the judgment of the Circuit Court which, as pointed out above, dismissed the complaint without leave to amend on the ground that no amendment would cure the defects in the merits of appellant's case.

decisions of this Court that a federal right cannot be defeated merely on the ground that the original complaint contained a curable defect.[6] On this point, the judgment of the Court affirming the dismissal of appellant's suit, insofar as that judgment rests upon the plurality opinion, seems to me to be totally without justification, either in reason, in precedent or in justice.[7]

My second ground of disagreement with the plurality opinion is that I think we should consider and decide now the constitutional issue raised in this case. No one has suggested that this is a contrived or hypothetical lawsuit. Indeed, we have it on no less authority than that of the Supreme Court of Wisconsin that the Wisconsin State Bar does in fact use money extracted from this appellant under color of law to engage in activities intended to influence legislation. The appellant has alleged, in a complaint sworn to under oath, that many of these activities are in opposition to the adoption of legislation which he favors. In such a situation, it seems to me to be nothing more than the emptiest formalism to suggest that the case cannot be decided because the appellant failed to allege, as precisely as four members of this Court think he should, what it is that the Bar does with which he disagrees. And it certainly seems unjust for the appellant to be thrown out of court completely without being given a chance to amend his complaint and for a judgment against

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[6] See, *e. g.*, *Brown* v. *Western R. of Alabama*, 338 U. S. 294, especially at 296.

[7] The authorities relied upon by the plurality opinion certainly do not support its position. The concurring opinion in *United States* v. *C. I. O.*, 335 U. S. 106, 124–129, does not suggest that a litigant who fails properly to "shape" constitutional issues should be thrown out of court completely for his failure. And the decision of the Court in *United States* v. *International Union, U. A. W.-C. I. O.*, 352 U. S. 567, plainly cannot be taken to justify such a disposition since that case was remanded for further proceedings.

him to be affirmed without consideration of the merits of his cause even though that judgment may later be held to constitute a complete bar to assertion of his First Amendment rights. Even if the complaint in this case had been drawn in rigid conformity to the meticulous requirements of the plurality, we would be presented with nothing but the very same question now before us: Can a State, consistently with the First and Fourteenth Amendments, force a person to support financially the activities of an organization in support of views to which he is opposed? Thus, the best, if not the only, reason I can think of for not resolving that question now is that a decision on the constitutional question in this case would make it impossible for the Court to rely upon the doctrine of avoidance with respect to that same constitutional question to justify its strained interpretation of the Railway Labor Act in the *Street* case.[8]

On the merits, the question posed in this case is, in my judgment, identical to that posed to but avoided by the Court in the *Street* case. Thus, the same reasons that led me to conclude that it violates the First Amendment for a union to use dues compelled under a union-shop agreement to advocate views contrary to those advocated by the workers paying the dues under protest lead me to the conclusion that an integrated bar cannot take the money of protesting lawyers and use it to support causes they are against. What I have said in the *Street* case would be enough for me to dispose of the issues in this case were it not for the contention which has been urged by the appellee throughout this case that there are

[8] As I have indicated in my dissenting opinion in that case, I also think the Court went to extravagant lengths to avoid the constitutional issue in that case. *Ante*, at —. And I think it clear that the Court would have no choice but to meet and decide the constitutional issue in *Street* if a decision on that issue were made in this case. See *id.*, at —.

distinguishing features that would justify the affirmance of this case even if the statute in the *Street* case were struck down as unconstitutional.

The appellee's contention in this respect rests upon two different arguments. The first of these is that the use of compelled dues by an integrated bar to further legislative ends contrary to the wishes of some of its members can be upheld under the so-called "balancing test," which permits abridgment of First Amendment rights so long as that abridgment furthers some legitimate purpose of the State.[9] Under this theory, the appellee contends, abridgments of speech "incidental" to an integrated bar must be upheld because the integrated bar performs many valuable services for the public. As pointed out above, the Wisconsin Supreme Court embraced this theory in express terms. And the concurring opinion of MR. JUSTICE HARLAN, though not purporting to distinguish the *Street* case, also adopts the case-by-case "balancing" approach under which such a distinction as, indeed, any desired distinction is possible.

The "balancing" argument here is identical to that which has recently produced a long line of liberty-stifling decisions in the name of "self-preservation."[10] The interest of the State in having "public expression of the views of a majority of the lawyers" by compelling dissenters to pay money against their will to advocate views they detest is magnified to the point where it assumes overpowering proportions and appears to become almost

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[9] A complete statement of the arguments underlying the "balancing test" is set out in *American Communications Assn.* v. *Douds*, 339 U. S. 382, in which this Court held that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment are outweighed by the power of Congress to regulate interstate commerce.

[10] See, *e. g.*, *Dennis* v. *United States*, 341 U. S. 494, 509–511; *Barenblatt* v. *United States*, 360 U. S. 109, 127–128; *Wilkinson* v. *United States*, 365 U. S. 399, 411.

as necessary a part of the fabric of our society as the need for "self-preservation." On the other side of the "scales," the interest of lawyers in being free from such state compulsion is first fragmentized into abstract, imaginary parts, then minimized part by part almost to the point of extinction, and finally characterized as being of a purely "chimerical nature." As is too often the case, when the cherished freedoms of the First Amendment emerge from this process, they are too weightless to have any substantial effect upon the constitutional scales and must therefore be sacrificed in order not to disturb what are conceived to be the more important interests of society.

I cannot agree that a contention arising from the abridgment of First Amendment freedoms which results from compelled support of detested views can properly be characterized as of a "chimerical nature" or, in the words of the Wisconsin Supreme Court, as involving nothing more than a "slight inconvenience." [11] Quite the contrary, I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against. And, as stated many times before, I do not subscribe to the theory that abridgments of First Amendment freedoms can ever be permitted on a "balancing" basis.[12] I reiterate my belief

[11] 10 Wis. 2d, at 242.

[12] See, *e. g.*, *Scales* v. *United States*, — U. S. —, — (dissenting opinion); *Communist Party* v. *Subversive Activities Control Board*, — U. S. —, — (dissenting opinion); *In re Anastaplo*, 366 U. S. 82, 110–112 (dissenting opinion); *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 62–71 (dissenting opinion); *Braden* v. *United States*, 365 U. S. 431, 441–446 (dissenting opinion); *Wilkinson* v. *United States*, 365 U. S. 399, 422–423 (dissenting opinion); *Uphaus* v. *Wyman*, 364 U. S. 388, 392–393 (dissenting opinion); *Barenblatt* v. *United States*, 360 U. S. 109, 140–144 (dissenting opinion); *American Communications Assn.* v. *Douds*, 339 U. S. 382, 445–453 (dissenting opinion).

that the unequivocal language of the First Amendment was intended to mean and does mean that the Framers of the Bill of Rights did all of the "balancing" that was to be done in this area. It is my firm belief that, in the long run, the continued existence of liberty in this country depends upon the abandonment of the constitutional doctrine that permits this Court to reweigh the values weighed by the Framers and thus to weaken the protections of the Bill of Rights. This case reaffirms that belief for it shows that the balancing test cannot be and will not be contained to apply only to those "hard" cases which at least some members of this Court have regarded as involving the question of the power of this country to preserve itself. For I assume that no one would argue that the power at stake here is necessary to that end.

Moreover, if I felt that I had the power to reweigh the "competing" values involved, I would have no difficulty reaching the conclusion that the loss inflicted upon our free way of life by invasion of First Amendment freedoms brought about by the powers conferred upon the Wisconsin integrated bar far outweighs any state interest served by the exercise of those powers by that association. At stake here is the interest of the individual lawyers of Wisconsin in having full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against, as well as the interest of the people of Wisconsin and, to a lesser extent, the people of the entire country in maintaining the political independence of Wisconsin lawyers.[13] How is it possible that such formidable interests so vital to our free way of life can be said to be outweighed by any interest—much less the wholly

[13] Cf. *Cohen* v. *Hurley*, 366 U. S. 117, 138–150 (dissenting opinion); *Imre Anastaplo*, 366 U. S. 82, 114–116 (dissenting opinion); *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 73–74, 77–80 (dissenting opinion).

imaginary interest urged here by the State which would have us believe that it will never know what its lawyers think about certain political questions if it cannot compel them to pay their money to support views they abhor? Certainly, I feel entirely confident in saying that the Framers of the First Amendment would never have struck the balance against freedom on the basis of such a demonstrably specious expediency.

In saying all this, I do not mean to suggest that the Wisconsin State Bar does not provide many useful and entirely lawful services. Quite the contrary, the record indicates that this integrated bar association, like other bar associations both integrated and voluntary, does provide such services. But I think it clear that these aspects of the Wisconsin State Bar are quite beside the point so far as this case is concerned. For a State can certainly insure that the members of its bar will provide any useful and proper services it desires without creating an association with power to compel members of the bar to pay money to support views to which they are opposed or to fight views they favor. Thus, the power of a bar association to advocate legislation at the expense of those who oppose such legislation is wholly separable from any legitimate function of an involuntary bar association and, therefore, even for those who subscribe to the balancing test, there is nothing to balance against this invasion of constitutionally protected rights.

The second ground upon which the appellee would have us distinguish compelled support of hated views as practiced by an integrated bar from compelled support of such views as practiced by the unions involved in the *Street* case is that lawyers are somehow different from other people. This argument, though phrased in various ways, amounts to nothing more than the contention that

the practice of law is a high office in our society which is conferred by the State as a privilege and that the State can, in return for this privilege, impose obligations upon lawyers that it could not impose upon those not given "so high a privilege." Were it not for this Court's recent decision in *Cohen* v. *Hurley*,[14] I would regard this contention as utterly frivolous. But, it is true that the Court did hold in the *Cohen* case that lawyers could be treated differently from other people, at least insofar as a constitutional privilege against self-incrimination is concerned. As I pointed out in my dissenting opinion in that case, it is a short step from that position to the position now urged in the concurring opinion of MR. JUSTICE WHITTAKER—that lawyers must also give up their constitutional rights under the First Amendment in return for the "privilege" that the State has conferred upon them.[15]

I do not believe that the practice of law is a "privilege" which empowers Government to deny lawyers their constitutional rights. The mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights for the precise pur-

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[14] 366 U. S. 117. The decision of the New York Court of Appeals in that case was expressly rested in part upon the notion that the practice of law is a "special privilege." See, *id.*, at 132–133 (dissenting opinion). And I thought then, as I think now, that the decision of this Court upholding the judgment of the New York court placed "the stamp of approval upon a doctrine that, if permitted to grow, as doctrines have a habit of doing, can go far toward destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify its existence." *Id.*, at 135 (dissenting opinion).

[15] *Id.*, at 142–143 (dissenting opinion).

pose of insuring the independence of the individual against the Government and those acting for the Government. What I said in the *Cohen* case is, in my judgment, equally applicable here:

> ". . . [O]ne of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people." [16]

As I see it, the single, sharply defined constitutional issue presented in this case does not raise a difficult problem. This appellant is not denying the power of the State of Wisconsin to provide that its bar shall engage in non-political and non-controversial activities or even the power of the State to provide that all lawyers shall pay a fee to support such activities. What he does argue, and properly I think, is that the State cannot compel him to pay his money to further the views of a majority or any other controlling percentage of the Wisconsin State Bar when that controlling group is trying to pass laws or advance political causes that he is against. If the "privilege" of being a lawyer renders that argument unsound, it is certainly one of the more burdensome privileges Government can confer upon one of its citizens. And lawyers might be well advised to reconsider the wis-

[16] *Id.*, at 138–139 (dissenting opinion).

dom of encouraging the use of a slogan which, though high-sounding and noble in its outward appearance, apparently imposes heavy burdens upon their First Amendment freedoms.

I would reverse this case and direct the Supreme Court of Wisconsin to refund the dues exacted under protest from the appellant in order to permit the Wisconsin State Bar to advocate measures he is against and to oppose measures he favors. I think it plain that lawyers have at least as much protection from such compulsion under the Constitution as the Court is holding railroad workers have under the Railway Labor Act.

SUPREME COURT OF THE UNITED STATES

No. 200.—October Term, 1960.

Trayton L. Lathrop, Appellant, v. Joseph D. Donohue.	On Appeal From the Supreme Court of the State of Wisconsin.

[June 19, 1961.]

Mr. Justice Douglas, dissenting.

The question in the present case concerns the power of a State to compel lawyers to belong to a statewide bar association, the organization commonly referred to in this country as the "integrated bar." There can be no doubt that lawyers, like doctors and dentists, can be required to pass examinations that test their character and their fitness to practice the profession. No question of that nature is presented. There is also no doubt that a State for cause shown can deprive a lawyer of his license. No question of that kind is involved in the present case.[1] The sole question is the extent of the power of a State over a lawyer who rebels at becoming a member of the integrated bar and paying dues to support activities that are offensive to him. Thus the First Amendment, made applicable to the States by the Fourteenth, is brought into play. And for the reasons stated by Mr. Justice Black, I think all issues in the case are ripe for decision.

If the State can compel all lawyers to join a guild, I see no reason why it cannot make the same requirement of doctors, dentists, and nurses. They too have responsi-

[1] A self-policing provision whereby lawyers were given the power to investigate and disbar their associates would raise under most, if not all, state constitutions the type of problem presented in *Schechter Corp.* v. *United States*, 295 U. S. 495. See 1 Davis, Administrative Law Treatise, § 2.14.

bilities to the public; and they also have interests beyond making a living. The groups whose activities are or may be deemed affected with a public interest are indeed numerous. Teachers are an obvious example. Insurance agents, brokers, and pharmacists have long been under licensing requirements or supervisory regimes. As the interdependency of each person on the other increases with the complexities of modern society, the circle of people performing vital services increases. Precedents once established often gain momentum by the force of their existence. Doctrine has a habit of following the path of inexorable logic.

We established no such precedent in *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225. We dealt there only with a problem in collective bargaining, *viz.*, is it beyond legislative competence to require all who benefit from the process of collective bargaining and enjoy its fruits to contribute to its costs? We held that the evil of those who are "free riders" may be so disruptive of labor relations and therefore so fraught with danger to the movement of commerce that Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions. The power of a State to manage its internal affairs by requiring a union-shop agreement would seem to be as great.

In the *Hanson* case we said, to be sure, that if a lawyer could be required to join an integrated bar, an employee could be compelled to join a union shop. But on reflection the analogy fails.

Of course any group purports to serve a group cause. A medical association that fights socialized medicine protects the fees of the profession. Yet not even an immediate cause of that character is served by the integrated bar. Its contribution is in policing the members of the

legal profession and in promoting what the majority of the Bar thinks is desirable legislation.

The Supreme Court of Wisconsin said that the integrated bar, unlike a voluntary bar association, was confined in its legislative activities. Though the Wisconsin Bar was active in the legislative field, it was restricted to administration of justice, court reform, and legal practice. The court however added:

> "The plaintiff complains that certain proposed legislation, upon which the State Bar has taken a stand, embody changes in substantive law, and points to the recently enacted Family Code. Among other things, such measure made many changes in divorce procedure, and, therefore, legal practice. We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law." 10 Wis. 2d 230, 239.

It is difficult for me to see how the State can compel even that degree of subservience of the individual to the group.

It is true that one of the purposes of the State Bar Association is "to safeguard the proper professional interests of the members of the bar." State Bar of Wisconsin, Rule 1, § 2. In this connection, the association has been active in exploiting the monopoly position given by the licensed character of the profession. Thus, the Bar has compiled and published a schedule of recommended minimum fees. See Wis. Bar Bull., Aug. 1960, p. 40. Along the same line, the Committee on Unauthorized Practice of the State Bar, along with a Committee on Inter-professional and Business Relations, have been set up to police activities by nonprofessionals within "the

proper scope of the practice of law." State Bar of Wisconsin, By-Laws, Art. IV, §§ 8, 11.

Yet this is a far cry from the history which stood behind the decision of Congress to foster the well-established institution of collective bargaining as one of the means of preserving industrial peace. That history is partially crystallized in the language of the Wagner and Taft-Hartley Acts: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. § 151. It was with this history in mind that we spoke when we said that "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work." *Railway Employes' Dept.* v. *Hanson*, *supra*, 235.

Nor can the present association be defended on grounds that it renders only public services.

If we had here a law which required lawyers to contribute to a fund out of which clients would be paid in case attorneys turned out to be embezzlers,[2] the present objection might not be relevant. In that case one risk of the profession would be distributed among all members of the group. The fact that a dissident member did not feel

[2] See 84 Rep. Am. Bar Assn., pp. 365–367, 513–515, 604–606 (1960); Voorhees, A Progress Report: The Clients' Security Fund Program, 46 Am. Bar Assn. Jour., 496 (1960); Voorhees, Should The Bar Adopt Client Security Funds?, 28 Jour. Bar Assn. Kan. 5 (1959). As of May 1961, Arizona, Colorado, Connecticut, New Hampshire, New Mexico, Ohio, Pennsylvania, and Washington have such funds.

he had within him the seeds of an embezzler might not bar a levy on the whole profession for one sad but notorious risk of the profession. We would also have a different case if lawyers were assessed to raise money to finance the defense of indigents. Cf. *In re Florida Bar*, 62 So. 2d 20, 24. That would be an imposition of a duty on the calling which partook of service to the public. Here the objection strikes deeper. An attorney objects to a forced association with a group that demands his money for the promotion of causes with which he disagrees, from which he obtains no gain, and which is not a part and parcel of service owing litigants or courts.

The right of association is an important incident of First Amendment rights. The right to belong—or not to belong—is deep in the American tradition. Joining is one method of expression. This freedom of association is not an absolute. For as I have noted in my opinion in *International Assn. of Machinists* v. *Street*, *ante*, p. —, decided this day, the necessities of life put us into relations with others that may be undesirable or even abhorrent, if individual standards were to obtain. Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I think exceptional circumstances should be shown. I would treat laws of this character like any that touch on First Amendment rights. Congestion of traffic, street fights, riots and such may justify curtailment of opportunities or occasions to speak freely. Cf. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. But when those laws are sustained, we require them to be "narrowly drawn" (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311) so as to be confined to the precise evil within the competence of the legislature. See *Shelton* v. *Tucker*, 364 U. S. 479; *Gremillion* v. *N. A. A. C. P.*, 366 U. S. —. There is here no evil shown. It has the mark of "a lawyer class" or

caste"—the system of "a self-governing and self-disciplining bar" such as England has.[3] The pattern of this legislation is regimentation. The inroads of an integrated bar on the liberty and freedom of lawyers to espouse such causes as they choose was emphasized by William D. Guthrie[4] of the New York Bar:[5]

> "The idea seems to be, contrary to all human experience, that if power be vested in this at present unknown and untried as well as indifferent outside body, holding themselves aloof from their profession, they will somehow become inspired with a high professional sentiment or sense of duty and cooperation and will unselfishly exercise their majority power for the good of their profession and the public, that they can be trusted to choose as their officers and leaders lawyers of the type who are now leaders, that the responsibility of power will necessarily sober and elevate their minds, and finally that democracy calls for the rule of the majority.
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> "Thus, the traditions and ethics of our great profession would be left to the mercy of mere numbers officially authorized to speak for us! This would be adopting all the vices of democracy without the reasonable hope in common sense of securing any of its virtues. It would be forcing the democratic dogma of mass or majority rule to a dangerous and pernicious extreme.
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> "Although in political democracy the rule of the majority is necessary, the American system of democracy is based upon the recognition of the imperative necessity of limitations upon the will of the majority. In the proposed compulsory or involuntary incor-

[3] Guthrie, The Proposed Compulsory Incorporation of the Bar, 4 N. Y. L. Rev. 223, 231 (1926).

[4] See Swaine, The Cravath Firm (1946), Vol. I, pp. 359, 518.

[5] Guthrie, *supra*, note 3, 234–235.

> poration of the bar, there would be no limitation whatever, and the best sentiments and traditions of the profession, of the public-spirited and high-minded lawyers who are now active in the voluntary bar associations of the state, could be wholly and wantonly disregarded and overruled." [6]

This regimentation appears in humble form today. Yet we know that the Bar and Bench do not move to a single "nonpartisan" objective. The obvious fact that they are not so motivated is plain from *Cohen* v. *Hurley*, 366 U. S. 117, which we decided only the other day. Once we approve this measure we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.[7]

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[6] Compare with this, the language of the court below in this case: "[I]t promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the [Integrated] State Bar." 10 Wis. 2d 230, 242.

[7] A current observer has commented on the results of the regimented Bar in England:

"Britain is moving towards a dangerous dictatorship not only in journalism, wireless, and television, but in finance and law. The immense groups controlling financial operations are becoming more and more interlocked and have an increasing tendency to cover up each other's errors.

"The great firms of solicitors are less and less inclined to offend the powerful financial houses which place the biggest business: and if dishonesty is alleged they all too often refuse 'to act' if this should involve one of the great interests upon which the big and profitable business of our times depends.

"Slowly, dangerously, and without the public fully realising what is happening, a nation of great power bottled up in a tiny geographi-

Those brigades are not compatible with the First Amendment. While the legislature has few limits where strictly social legislation is concerned (*Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Tot* v. *United States*, 319 U. S. 463) the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority.

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cal area is being brought within the grip of a minority of extremely powerful men whose genius is to deny the smallest pretension to power, but who, in fact, are wholly ruthless in a persistent search for power.

"In this search, although money is vital, they are ready to be Radical in many ways—particularly in the destruction of all rivalry f r influence which might spring from a widespread continuity of wealth in the hands of proprietors of family businesses or land.

"To destroy this movement towards Press monopoly and financial 'cover-up,' it will be necessary for individuals still preserved from 'take-over' to support every form of independent journalism and finance. Unhappily, in the field of journalism the smaller groups are so afraid of worse than already threatens, that the tendency is towards surrender. This must be stopped." The Weekly Review, Feb. 3, 1961, pp. 1, 2.